TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~345~~ 118

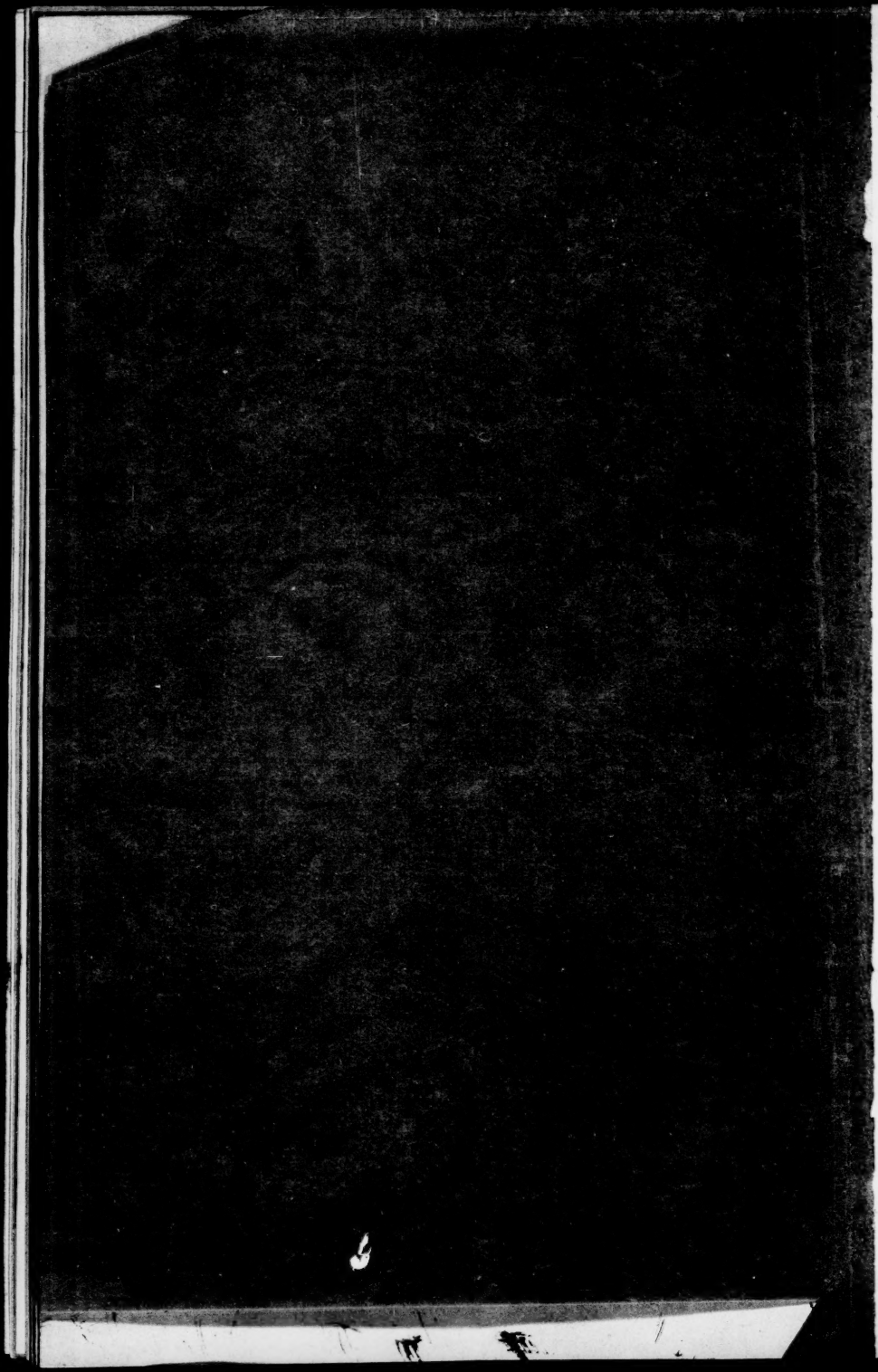
THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EYSER.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

FILED DECEMBER 1, 1873.



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1 In the supreme court of Colorado Territory, of the February term, A. D. 1873.

TERRITORY OF COLORADO, *ss:*

At a stated term of said supreme court begun and held at the city of Denver, in said Territory, on the second Tuesday of February, (it being the eleventh day of said month,) A. D. 1873.

Present, Honorable Moses Hallett, chief-justice, and Honorable Ebenezer T. Wells, associate-justice; M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court.

Among other the following proceedings were had and appear of record and on file of said supreme court.

Be it remembered that, heretofore, to wit, on the 13th day of February, A. D. 1873, there was filed in the office of the clerk of the supreme court of Colorado Territory a transcript of record of the district court of the first judicial district of Colorado Territory, sitting within and for the county of Arapahoe, duly certified by the clerk of said district court, with an assignment of errors thereto attached, and which said transcript of record and assignment of errors are in the words and figures following, to wit:

2 TERRITORY OF COLORADO,
County of Arapahoe, ss:

Pleas in the district court of the first judicial district of Colorado Territory, sitting in and for the county of Arapahoe, before the Honorable Christian S. Eyster, associate-justice of the supreme court of said Territory, assigned to said judicial district at a term thereof begun and held at the court-house in Denver, in said county, on the first Tuesday (it being the third day) of January, A. D. one thousand eight hundred and seventy-one (1871.)

Present, Honorable Christian S. Eyster, judge of said court, M. A. Rogers, esq., district attorney of said judicial district, D. J. Cook, esq., sheriff of said county, and Oliver A. Whittemore, clerk of said court.

IN THE MATTER OF CHARLES EYSER
versus
THE WESTERN UNION TELEGRAPH COMPANY. } Trespass on the case.

Be it remembered, to wit, on the 15th day of November, A. D. 1870, came the said plaintiff, by his attorneys, and sued out of said court a writ of summons against the said defendant in a plea of trespass on the case; which said summons, together with the sheriff's return thereon endorsed, is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

3 The people of the Territory of Colorado to the sheriff of Arapahoe County, greeting:

We command you, that you summon The Western Union Telegraph Company, if it shall be found in your county, personally to be and appear before the district court of said Arapahoe County, on the first day of the next term thereof, to be holden at the court-house in Denver, in said Arapahoe County, on the first Tuesday of January, 1871, to answer unto Charles Eyser in a plea of trespass on the case, to the damage of said plaintiff, as he says, in the sum of ten thousand ($10,000) dollars;

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

SEAL OF DISTRICT COURT ARAPAHOE COUNTY.

Witness, Oliver A. Whittemore, clerk of our said court and the seal thereof, at Denver, aforesaid, this fifteenth day of November, A. D. 1870.

OLIVER A. WHITTEMORE, *Clerk.*

(Endorsed:)

CHARLES EYSER
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

NOVEMBER 16th, 1870.

I have duly executed the within by reading the same to B. F. Woodard, superintendent and principle agent of the Western Union Telegraf Company, who resides in Arapahoe County, and le'ving a trew coppy of this writ with him, on this 16 day of November, A. D. 1870, as I am therein commanded.

D. J. COOK, *Sheriff,*
By R. SOPRIS, *Deputy.*

Fees: Service, $1.50; mileage, $ .40; copy, $1.00—$2.90.
Filed in the district court this 16th day of November, A. D. 1870.
4 OLIVER A. WHITTEMORE, *Clerk.*

And afterwards, to wit, on the third day of December, A. D. 1870, again come the plaintiff, by his attorneys, and filed herein his declaration in the above entitled cause, and the same is in the following words and figures, to wit:

In the district court of the first judicial district of Colorado Territory, in and for the county of Arapahoe. To the January term, A. D. 1871.

TERRITORY OF COLORADO,
Arapahoe County, ss:

Charles Eyser, plaintiff, by Browne, Harrison & Putnam, his attorneys, complains of the Western Union Telegraph Company, the defendant, of a plea of trespass on the case, for that whereas on, to wit, on the 18th day of April, A. D. 1870, at the county aforesaid, the defendant being a body corporate, under the name and style aforesaid, and the said defendant, its agents, servants, and superintendents, being then and there engaged, occupied, and employed in the construction, erection, and establishment of a line of telegraph, for the use and benefit and under the control and management of the defendant and for the convenience of the public, passing in and through and over a portion of the city of Denver, in the said county, and along and across Blake st., and at or near the corner of the said street and F street, the said Blake street and F street being then and there, and for a long time previous thereto having been and still being common highways or public streets in the aforesaid city and county, over, along, and across which the public were, and are, and had for a long time previous been, in
5 the habit of lawfully passing and repassing either on foot, horse-

back, or in carriages or other vehicles; and the plaintiff further avers that on the day and year last aforesaid, at the county aforesaid, and whilst the defendant, its agents, servants, and superintendents, were then and there engaged, occupied, or employed, in the construction, erection, and establishment of the line of telegraph aforesaid, in, over, along, and across the said Blake street, and at and near the corner of the said Blake and F streets, the said defendant, its agents, servants, and superintendents, unlawfully, wrongfully, and without proper and due care and diligence, placed, stretched, and strung, and caused and procured to be placed, stretched, and strung a certain telegraphic wire or wires, in, over, along, and across the aforesaid Blake street, and at or near the aforesaid corner of Blake and F streets, at the height of, to wit, at the height of eighteen inches from and above the surface or level of the said Blake street, and did then and there unlawfully, wrongfully, and without proper care, diligence, and precaution, and to the great danger of all persons who might happen to be passing or repassing at the time, either on horseback, carriages or other vehicles, continue and keep, and cause, procure, and permit the said telegraphic wire or wires to be continued and kept so placed, stretched, and strung as aforesaid, in, over, along, and across the street aforesaid, for a long space of time, to wit, for the space of one hour; and the plaintiff further avers that whilst the said telegraphic wire or wires were and continued to be so unlawfully, wrongfully, and without due care, diligence, and precaution, placed, stretched, and strung, as aforesaid, over, along, and across the street aforesaid, and whilst the plaintiff was then and there lawfully passing and riding on horseback along and across the said street
6 with all reasonable care, diligence, and speed, and without any notice or warning of the said obstruction, and by reason thereof the said horse on which the plaintiff was then and there riding became entangled in, with, and by, and stumbled and fell in, over, and amidst the said telegraphic wire or wires, thereby causing the plaintiff to be suddenly and violently precip'ated and thrown to the ground, whereby he became and was seriously and painfully wounded, bruised, maimed, disfigured, disabled, and otherwise injured, in the mouth, jaws, breast, sides, arms, legs, hands and other parts of the body, and in particular received and sustained a painful and dangerous concussion in the chest and lungs, and a painful and severe contusion in the right leg, and also had a part of the jaw-bone, which contains the teeth, fractured and broken, and three of his teeth so loosened, injured, and knocked out, as to deprive him entirely of all use thereof; and also had his left thumb badly and painfully sprained and dislocated; and also then and there received and sustained other injuries, from the effect and by reason of all which the plaintiff was then and there rendered and remained insensible and unconscious for a long time, to wit, for the space of four hours; and by reason whereof, moreover, he was confined to his bed for a long time, to wit, for the space of twenty-one days, and subjected to great pain and suffering during that period; and was also, during that period, compelled to employ a physician and surgeon to attend him at a great expense, to wit, at the expense of $150; and was also after he left his bed compelled to walk upon crutches for a long time, to wit, for the space of four weeks, and was also by reason of the said injuries and for a long time, to wit, for the space of two months, wholly incapacitated and prevented from performing and discharging his usual
7 work and labor as a carpenter, (which was and is his regular business and occupation,) and to his great damage and loss on this account, to wit, to the damage and loss on this account of $500.

And the plaintiff avers that he was otherwise injured, &c., to wit, at the county aforesaid, on the day and year aforesaid, to the damage of the plaintiff ten thousand dollars, ($10,000,) and therefore he brings this suit.

BROWNE, HARRISON & PUTNAM,
Attorneys for Plaintiff.

(Endorsed:) 1885. Charles Eyser *vs.* The Western Union Telegraph Co. Narr. filed December 3, 1870. Oliver A. Whittemore, clerk.

And afterwards, to wit, on the 31st day of January, A. D. 1871, came the said defendant and filed in said court his pleas to the said declaration of the plaintiff, which said pleas are in the following words, to wit:

In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid. Of the January term, A. D. 1871.

TERRITORY OF COLORADO,
County of Arapahoe:

THE WESTERN UNION TELEGRAPH COMPANY *ats.* CHARLES EYSER. } Trespass on the case.

And the said defendant, by Charles & Elbert, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not
8 guilty of the said supposed grievances laid to its charge in manner and form as the said plaintiff hath in his said declaration thereof complained against it, and of this it, the said defendant, puts itself upon the country, &c.

CHARLES & ELBERT,
Attys. for Defdt.

And the plaintiff doth the like.

By BROWNE, HARRISON & PUTNAM,
His Attys.

And for a further plea in this behalf, the said defendant by Charles & Elbert, its attorneys, comes and defends the wrong and injury when, &c., and says actio non, because it says that it, the said defendant, was not at the commencement of said suit, and is not now, and was not at the time the said supposed grievances in the said declaration mentioned were committed, a corporation, as by the said writ and declaration is above supposed, and of this it, the said defendant, puts itself upon the country, &c.

CHARLES & ELBERT,
Attys. Defds.

And for a further plea in this behalf, the said defendant by Charles & Elbert, its attorneys, says actio non, because it says that before, and at the time when, &c., in the said declaration mentioned it, the said defendant, was engaged in stretching its telegraph-wires across Blake street, one of the public streets within the city of Denver, and that the said plaintiff then also at the said time when, &c., was riding on horse-

back in and along said Blake street, in violation of the ordinances of said city of Denver, nevertheless the said defendant in fact says that the said plaintiff at the said time when, &c., so carelessly, negli-
9 gently, and improperly, managed his said horse in and along said Blake street, near to the said telegraph-wire of the said defendant, and by reason of the said mismanage' of said horse by the said plaintiff, and by and through the want of due care of the said plaintiff in the riding and management of his said horse in said street, and without any default or want of ordinary care on the part of this defendant, the said plaintiff's horse was then and there entangled in said wire, and thereby the said plaintiff sustained the injury in the said declaration mentioned; and so the said defendant in fact says that if any hurt or damage happened to the said plaintiff, it was caused by his own want of care in that behalf, and not by the default or want of due care on behalf of it, the said defendant, which are the said supposed grievances in the said declaration mentioned, and this the said defendant is ready to verify.

Wherefore it prays judgment, &c.

CHARLES & ELBERT,
Attys. Defdt.

And for a further plea in this behalf the said defendant by Charles & Elbert, its attorneys, says actio non, because it says that before, and at the time when, &c., in the said declaration mentioned, it, the said defendant, was engaged, using due and ordinary care and diligence in that behalf, in stretching its telegraph-wires across Blake street, one of the public streets in the city of Denver, a municipal corporation duly chartered by the legislature of Colorado Territory, and the said defendant avers that the said city of Denver, by virtue of its charter and the ordinances of said city at the said time when, &c., in the said declaration mentioned, had the exclusive care and control over the said Blake street, and that it was the duty of said city of Denver to keep the said Blake
10 street *and that it was the duty of said city of Denver to keep the said Blake street* free from all obstructions and other hindrances calculated to endanger persons travelling in and along said street. And so the said defendant in fact says, that if any hurt and damage happened to the said plaintiff, it so happened while he was riding in and along said Blake street, and whilst said Blake street was under the exclusive care and control of the said city of Denver, and that said city is primarily liable for such damages and injuries, and not this defendant, which are the said supposed grievances in the said declaration mentioned, and this it, the said defendant, is ready to verify.

Wherefore it prays judgment, &c.

CHARLES & ELBERT,
Attys. Defdt.

(Endorsed:) 1885. Charles Eyser vs. Western Union Telegraph Co. Pleas. Filed January 31, 1871. Oliver A. Whittemore, clerk. Charles & Elbert for dfdt.

And afterwards, to wit, on the 1st day of February, A. D. 1871, came the said plaintiff by his attorney, and filed in said court his demurrer to the second, third, and fourth (2, 3, & 4) pleas of the said defendant, and the said demurrer is in the words and figures following, to wit:

In the district court of the first judicial district of Colorado Territory, in and for Arapahoe County, January term A. D. 1871.

TERRITORY OF COLORADO,
Arapahoe County, ss:

11 CHARLES EYSER
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } Trespass on the case.

And the plaintiff says that the said pleas by the defendant secondly, thirdly, & fourthly, and each and every one of them, in manner and form as pleaded, and the matters therein contained and set forth, are not sufficient in law to bar the plaintiff of his aforesaid action against it, and that he is not bound by law to answer the same; and this he is ready to verify. Wherefore he prays judgment, etc., as aforesaid, etc.

By BROWNE, HARRISON & PUTNAM,
His Attys.

And the plaintiff shows to the court here the following special causes of demurrer:

To said second plea, that the said plea concludes to the country.

Second. To the said third plea does not aver that said Blake street was within the corporate limits of any incorporated city or town, and because said plea is uncertain and indefinite.

Third. Because the defense set up in the said 3d and fourth pleas can be given in evidence under the general issue.

Fourth. As to the second plea, because the defendant has first filed the plea of the general issue.

Fifth. Because the facts set up in the said 4th plea shows no defense to said action.

Wherefore he prays judgment as aforesaid, &c.

BROWNE, HARRISON & PUTNAM,
Pltff.'s Attys.

12 (Endorsed:) 1885. Charles Eyser vs. The Western Union Telegraph Co. Dem. to 2, 3, & 4th pleas. Filed February 1st, 1871. Oliver A. Whittemore, clerk.

And afterwards, to wit, on the 13th day of February, A. D. 1871, the same being one of the regular judicial day' of said court in said year, the following proceedings were had and entered in said court in said cause, to wit:

CHARLES EYSER
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } Trespass.

Now on this day the court having heretofore taken under advisement the demurrer of the said plaintiff to the pleas of the said defendant, submitted to the court without argument, and the court being fully advised in the premises, it is considered by the court that the said demurrer be sustained.

And afterwards, to wit, on the 2d day of January, A. D. 1872, the same being one of the regular judicial days of the January term of said

court in said year, the following proceedings were had and entered of record in said court in said cause, to wit:

CHARLES EYSER
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } Trespass.

13 Now on this day comes the said plaintiff, by S. E. Browne, esq., T. G. Putnam, esq., N. Harrison, esq., and E. L. Smith, esq., his attorneys, and the said defendant, by John Q. Charles, esq., and S. H. Elbert, esq., its attorneys, also comes, and thereupon comes a jury of twelve good and lawful men to try the issue herein joined between the said plaintiff and the said defendant, to wit, Randall Shoaf, A. B. Ingols, M. J. Deegan, John S. Calvert, J. P. Ringwalt, F. M. Danielson, George Schram, James M. Riland, W. G. Brainard, H. H. Jacobs, Austin Cunningham, and J. S. Taylor, and they are duly selected and tried, empanelled and sworn to well and truly try the issues herein joined between the parties in this cause and a true verdict give according to the evidence.

And thereupon the hearing of the evidence in this cause is postponed until to-morrow, Wednesday morning.

And afterwards, to wit, on the 3d day of January, A. D. 1872, the same being one of the judicial days of the January term of said court in said year, the following proceedings were had and entered of record in said court in said cause, to wit:

CHARLES EYSER
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } Trespass.

Now on this day comes the said plaintiff, by S. E. Browne, esq., T. G. Putnam, esq., N. Harrison, esq., and E. L. Smith, esq., his attorneys, and the said defendant, by John Q. Charles, esq., S. H. Elbert, esq., and M. Benedict, esq., its attorneys, also comes, and the jury heretofore empanelled and sworn in this cause being all present here in court in the jury-box, thereupon came the evidence until the hour of ad-
14 journment, when the further hearing of the evidence was postponed until to-morrow, Thursday, morning.

And afterwards, to wit, on the 4th day of January, A. D. 1872, the same being one of the regular judicial days of the January term of said court in said year, the following proceedings were had and entered of record in said court in said cause, to wit:

CHARLES EYSER
vs.
THE WESTERN UNION TELEGRAPH COMPANY. }

Now on this day comes the said plaintiff, by S. E. Browne, esq., T. G. Putnam, esq., N. Harrison, esq., and E. L. Smith, esq., his attorneys, and the said defendant, by John Q. Charles, esq., S. H. Elbert, esq., and M. Benedict, esq., its attorneys, also comes, and the jury heretofore empanelled and sworn in this cause being all present here in court, in the jury-box, thereupon the hearing of the evidence in this cause is resumed and concluded, after which, and the arguments of

counsel, and the instructions of the court to the jury, the jury retired to their room in charge of a sworn bailiff, to consider of their verdict; and *and* thereupon, by agreement of the said parties, it is ordered by the court, that if the said jury shall agree upon a verdict during the recess of the court, they have leave to reduce the same to writing, and after sealing the same and delivering it to the *the* bailiff in charge, to separate to meet the court at its next incoming.

And afterwards, to wit, on the 5th day of January, A. D. 1872, the same being one of the regular judicial days of the January term of said court in said year, the following proceedings were had and en-
15 tered of record in said court in said cause, to wit:

CHARLES EYSER
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } Trespass.

Now on this day comes the said plaintiff, by S. E. Browne, esq., T. G. Putnam, esq., N. Harrison, esq., and E. L. Smith, esq., his attorneys, and the said defendant, by John Q. Charles, esq., S. H. Elbert, esq., and M. Benedict, esq., its attorneys, also comes, and the jury heretofore empanelled and sworn in this cause being all present here in court in the jury-box, upon their oaths say that they find the said defendant guilty, and assess the plaintiff's damages on occasion of the premises at the sum of five thousand five hundred (5,500) dollars.

And afterwards, to wit, on the 24th day of January, A. D. 1872, the same being one of the regular judicial days of the January term of said court in said year, the following proceedings were had and entered of record in said court in said cause, to wit:

CHARLES EYSER
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } Trespass.

Now on this day comes the said plaintiff, by Messrs. Browne and Putnam, N. Harrison, esq., and E. L. Smith, esq., his attorneys, and the defendant, by Messrs. Charles and Elbert, its attorneys, also comes; thereupon comes on to be heard the motion of the said defendant for a new trial of this cause, which is argued by counsel, and the court
16 being fully advised in the premises, it is considered by the court that the said motion be denied. Therefore all and singular the premises being seen, and by the court here fully understood, it is considered by the court that the said plaintiff do have and recover of and from the said defendant the said sum of five thousand five hundred dollars, ($5,500\frac{00}{100}$,) in form aforesaid, assessed as his damages, and also his costs by him in and about the said suit in this behalf laid out and expended, taxed at and have execution therefor.

And thereupon the said defendant prays an appeal from the judgment of the court herein to the supreme court of this Territory, which is allowed to it upon condition that within forty days from this date it file herein a good and sufficient appeal-bond in the sum of eight thousand dollars, conditioned as required by law, and with sureties to be approved by the clerk of this court, and day until ninety days from this date is given the said defendant in which to tender its bill of exceptions to the

rulings of the court upon the trial of the issues herein, and in overruling the defendant's motion for a new trial. And it is ordered that upon the said bill of exceptions being allowed and signed by the judge of this court, the same be filed herein as of this date.

And afterwards, to wit, on the 24th day of January, A. D. 1872, came the said defendant by its attorneys, and filed in said court its bill of exceptions in said cause, which said bill of exceptions is in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of Colorado Ter-
17 ritory, within and for the county aforesaid. Of the January term, A. D. 1872.

CHARLES EYSER, PLAINTIFF,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, defendant. } Bill of exceptions.

Be it remembered that on the 2nd day of January, A. D. 1872, said day being of the days of the January term, A. D. 1872, of the said district court of the first judicial district of Colorado Territory, within and for the county of Arapahoe, the above-entitled cause, wherein Charles Eyser was named as plaintiff, and the Western Union Telegraph Company was named as defendant, came on for trial on the issues formed by the pleadings therein, and the said plaintiff, for the purpose of sustaining the said issues on his part, introduced the following testimony before the jury which had been empanelled in said cause for the trial thereof, viz:

B. F. Woodward, on behalf of said plaintiff, being first duly sworn, testified as follows, to wit:

"I was residing here in Denver April 8th, 1870. Knew of the erection of telegraph-wire through part of the city at that time. Knew of such erection on F, at corner of Blake street, at that time; have no memorandum of the exact date. It was on or about that time."

The plaintiff here asked the witness the following question: "Who was erecting that line, if you know?"

(To the asking of which question, defendants then and there objected because "question directed to prove agency of defendant by parol, im-
18 proper, because if the parties were acting under an agency, it must be shown by better proof than parol testimony; because not the best testimony; does not tend to prove the agency of the parties;" which objections were then and there overruled by the court, and an exception then and there taken by the defendant to said ruling.)

The witness answered: "The work was being done by a force in charge of Geo. J. Washburn."

Plaintiff then asked this question: "In whose charge was Washburn at that time?"

(Which question was then and there objected to by defendant, because not tending to prove that Washburn was agent of defendant, which objection was then and there overruled by the court, and an exception then and there taken by defendant.)

The witness answered: "Under my charge, I suppose. It is a diffi-

cult question to say for whom I was acting at that time. I don't think I can answer to this to my own satisfaction. The labor for the erection of the wire was paid for. I paid for it; I received remittance from St. Louis, to re-imburse me; I received the money in settlement of this account from R. C. Clowrey, of St. Louis.

The witness then, in answer to the question, "For whom did Clowrey act in the payment of this money?" testified as follows: "I couldn't say who Clowrey acted for; I made my report to Clowry—the report of the expenses incurred in building-wire: I made it to him, because I was instructed to do so by Mr. Hibbard, of Omaha; I had suggested to Hibbard that I could use a working force to advantage here, to expedite the building of this line. A party was already building this line from the East, and Gen'l Palmer had suggested he would have wire and insulators sent to Denver, if I would make up a party here. I laid the matter before Hibbard, and I received a telegram from Hibbard authorizing me to proceed with the work.

19 Plaintiff here asked the witness the following question: "Who was Hibbard; in what capacity was he acting over you; why did you receive orders from him?" which said question was then and there objected to by defendant, because not tending to prove an agency of defendant; which objection was then and there overruled by the court, and an exception then and there taken by defendant to said ruling. The witness answered: "Hibbard was over me as superintendant of the 3d district of the Western Union Telegraph Company. He directed me to report to Clowrey; I did make the report to Clowrey, in pursuance of that instruction. Clowrey settled the bill. I had already received the money covering these expenses; I received it from Clowrey by express. Some part of the money was sent through Mr. Johnson, (of the artesian well at Kit Carson.) Don't know in what capacity Clowrey was acting."

Plaintiff then asked the witness this question: "Do you know it from Hibbard?" to which question the defendant then and there objected, because there was "no proof that Hibbard was the agent of defendant to do this particular work, and because it is leading;" which objection was then and there overruled by the court, and defts. then and there excepted. The witness answered: "Hibbard's jurisdiction didn't extend to this Territory. I am under jurisdiction of Hibbard, but not under Clowrey. There was authority from Hibbard to me to do something outside of his district. Know Clowrey is superintendant of 2nd district, because I have understood so."

The plaintiff then asked the witness this question: "Did you ever have any business transactions with him, or correspondence with him, as superintendent of the 2nd district?" which said question was objected because it was leading; which said objection was overruled by the court, to which ruling of the court the said defendant then and there excepted, and the witness answered, "Yes, sir."

20 Said witness further testified as follows:

2nd district. At this time I had charge of the 2nd division of 3d district of deft.'s lines; that embraced the city of Denver. Had been acting for the defendant in that capacity for about a year—not before that in that capacity, but in another capacity. I had charge of Denver office previous to that for a few years. Have had charge of the interests of the defendant in Denver since October, 1863, in one capacity and another. After the wire was erected, it was operated very soon after—2 or 3 weeks. It was operated mainly by operatives of railroad co. We had the wire in our office. The operators in my office operated

it there. Whatever proceeds there may have been went into the general receipts of defendant's office in the city of Denver.

Witness was here shown paper, marked "A, C. S. Eyster," on back, and asked to examine it. Witness then stated: "I was present at the time of the erection of the wire near the crossing of F and Blake; saw the erection of a portion of it."

Plaintiff here asked the witness the following question: "State whether this is, or is not, a copy of the contract between the Union Pacific Railroad Company, eastern division, and the defendant, under which the wire was erected." To which *the* question the said defendant objected, because it assumes that a contract was made, and none has been proven, which objection was overruled by the court, to which said ruling then defendant then and there excepted, and the witness answered: "I couldn't state as to that."

The witness then testified as follows: "I recognize this paper. I may have said on a former examination that this was a copy of the contract; but I should have qualified it, as I would do now if allowed to
21 state all I know about the paper."

Plaintiff here asked the witness: "Do you know of the existence of a contract between the defendant and the Kansas Pacific Railroad Co. for the construction of this line?" And the witness answered as follows: "I have heard there was such a contract; have no personal knowledge of it; this paper is the only knowledge I have; my recollection is that this identical paper was furnished me by Gen'l Palmer that I might take a copy of it. I think this is the same paper."

Plaintiff here asked the witness the following question: "Was not that paper recognized by your company as a copy of the contract under which the line of wires referred to was to be, or was being, erected?"

(To which said question the said defendant objected, which said objection was overruled by the court, and to which ruling of the court the said defendant then and there excepted.)

The witness answered as follows: "I never had any correspondence with our company in reference to this contract."

Plaintiff here asked this witness this question: "Did you not act under it?"

(Which said question was objected to by the said defendant because leading and incompetent, which said objection was overruled by the court, to which ruling of the court the said defendant then and there excepted.)

And the witness answered: "There wasn't any other contract between my company and any other company for the erection of the wire that I know of."

Plaintiff here asked the witness the following question: "Do you not know that this paper is a copy of the contract recognized by both companies as containing the terms and conditions under which this wire was erected, and that this copy was the identical paper, or a copy of
22 the identical paper, furnished to you as your guide in the construction of said line?"

(To which question the said defendant objected, because the question assumes a contract in existence without proving it, and because there is no proof that a contract was recognized; which said objection was overruled by the court, and to which ruling of the court the defendant then and there excepted.)

The witness then answered as follows: "The only authority I had in what I did was the telegram I mentioned having received; have never yet been able to see that I had anything to do with the contract, or that

the terms of the contract were carried out in this work. I kept the copy which I took."

Plaintiff then asked the witness the following question: "Do you know whether the Union Pacific Railroad Company, eastern division, and the defendant, through their agents, recognized the terms of this paper as the copy of a contract under which this wire was erected?"

(Which said question was objected to by the said defendant because immaterial; which said objection was overruled by the court, to which said ruling of the court the defendant then and there excepted.)

The witness answered as follows: "I have supposed so."

(Defendant here moved the court to strike out the supposition of said witness; which said motion was overruled by the court. To which said ruling of the court the said defendant then and there excepted.)

The plaintiff then asked this question: "Tell the jury why you suppose so."

The witness answered: "I have supposed that the work was done outside of this contract, and under a mutual understanding. So far as the construction of this line is concerned, I should have replied to your question, No, because I don't think it comes under that contract at all. Our principal office is in New York City."

Plaintiff here asked this question: "Between whom was this mutual understanding to which you have referred?"

23 (Which said question was objected to by the defendant, because it goes to a matter only supposed by the witness; which said objection was overruled by the court; to which said ruling of the court said defendant then and there excepted.)

The witness answered as follows: "Originally between myself and Gen'l Palmer."

Question asked by plaintiff: "For whom were you acting?"

Answer of witness: "I have already answered that."

Question asked witness by plff.: "Subsequently between whom was the understanding?"

Answer of witness: "All I know in regard to it is the authority I received for doing the work, from Hibbard, and the subsequent report of it to Clowrey."

In answer to questions by the court, witness said: "After the line of which the wire across Blake street at the crossing of F was part, & within two or three weeks was operated, the proceeds, in this city, of the wire, whatever they were, went into the general account of the office of defendant here, of which I am in charge. The proceeds are still, that is, any pay-business we send over that line, goes into the general receipts of that office, if we send any pay-business over that line; think there has been pay-business sent on the line since its erection. That particular line was taken down shortly after the completion of the railroad. So long as it was operated this condition of things continued. The line was taken down by a force sent here from the East; don't know positively who sent them; have no positive knowledge as to Mr. Crowley's official position. I have corresponded with him and addressed him as superintendent of the 2nd district; have had such correspondence for the last two and a half or three years."

Question by the court: "How has that correspondence been conducted; by letter or telegraph?"

24 (To which said question the said defendant objected because immaterial; that the correspondence is the best evidence, and because it don't appear that Crowley was ever in the employ of defend-

ant; which objection was overruled by the court, and to which said ruling the said defendant then and there excepted.)

The witness answered: "By letter and telegraph both."

The court then asked the witness this question: "Was the telegraph correspondence over the lines of the defendant?

(Which question was objected to by defendant because the acts of Crowley not sufficient to prove the agency; which objection was overruled by the court, and to which said ruling the said defendant then and there excepted.)

The witness answered: "It may have been. We send messages over any line that is working. I could not testify positively that I ever sent any myself. I have addressed messages to him, and they have been put on file and sent either by the way of Omaha, or Kansas City; don't know that I ever sent any myself, personally. The line by the way of Omaha is part of the line of defendant; can't state in how many instances such messages have been sent; may have sent him half a dozen, perhaps; think the line was operated both by the Denver office of defendant, and by the construction-company of the Kansas Pacific Railroad Co. This portion across Blake street and F was never operated before D operated.

Plaintiff closes direct examination.

Cross-examined by deft., witness testified as follows: "I never compared this paper, which has been shown me, with any original. Never saw any original."

Counsel for defendant ask the witness the following question: "State on what your suppositions are based as to any mutual understanding based on this contract." To which the witness answered as follows:

"Only because the work was done. The proposition first, on my
25 part, to Gen'l Palmer, that I could put on a force here, and hurry the work up. The understanding was between myself and Gen'l Palmer, and was acquiesced in by Hibbard. I don't know, of my own knowledge, that there ever was any mutual understanding between the Railroad Company and defendant in relation to that matter."

Defendant then asked the witness the following question: "Who owned the wire put up there on that occasion?"

The witness answered: "I couldn't state from positive knowledge who owned it. Yes; I think I could, too. I sold the wire to Gen'l Palmer myself. I sold 75 or 80 miles of wire to him."

Defendant here asked the witness this question: "For whose benefit was that wire put up on that occasion, if you know?"

The witness answered as follows: "It was put up at that time for the benefit of the construction co. of the Kansas Pacific Railroad Co. They proceeded to use it as soon as it was put up—as soon as it was in working order."

Witness further testified: "I never heard any objection to its being used by our company. The wire was run into two offices—Gen'l Palmer's, and defendant's office, in Denver. Till it was taken down that wire was the wire of the railroad co. Hibbard was superintendent of the 3d district. I know this only because I communicated with him as such. I suppose my appointment comes indirectly through Hibbard. The appointment was made by Hibbard, through the recommendation of his superior officer, Gen'l Stager. Hibbard's general authority wouldn't extend into the Territory when the wire was put up. His authority only extends to Denver City. It included Denver City. My authority as general superintendent didn't authorize me to erect this line then. My authority is only to look after the general interests of the com-

26 pany within a specified district. I have the employment of operators, and the general charge of offices in this subdistrict, and also the general repairs of the line. As superintendent of this district, I have no control over this wire furnished by the Kansas Pacific Railroad, excepting that, as a rule, all branch offices are subject to the principal office in the city where located, and if I knew of any violation of the rules of the company by operators in Genl. Palmer's office, it would be my duty to report it to the officers of the company, though I might not have any authority to report it."

Defendant here asked the witness the question: "You state Clowrey was superintendent of the 2nd district in which this wire was. How do you know this—of your own knowledge or by hearsay?" And the witness answered as follows: "I never saw his credentials. I only know he is recognized as such. I have no positive knowledge that defendant recognized him as such. I suppose him to be such. When I speak of two lines on which I corresponded with Crowley, I mean the two lines by way of Omaha, and on the Kansas Pacific Railroad. I suppose the line on the Kansas Pacific Railroad was built by that company. I know that I sold wire to Gen'l Palmer for the line on the Kansas Pacific Railroad. The insulators were sent from the East. Gen'l Palmer made the contract for the poles. Don't know who sent the insulators—at least, who paid for them. That part of the line from Cheyenne to Omaha is the defendant's; that part of the line from Cheyenne to Denver belongs to the United States and Mexico Telegraph Company. The line was taken down by a party coming from the East. I have no positive knowledge who paid the expense. I suppose I know. The wire was taken down by George Macy, who was the line builder and repairer. It was taken down by nobody in my employ. It was taken down in order to change the route. The line was built originally for some distance east of Denver, on wagon-road, and when the railroad was completed, a line was finished through on that, and then this wire was taken down
27 and piled up at the junction of the Kansas Pacific Railroad. The wire taken down was the same I sold—a portion of it; no positive knowledge as to Palmer's relations to railroad co. He acted as superintendent of construction."

Re-examined by plaintiff:

On re-examination by plaintiff, the witness testified as follows: Have no positive information as to whose employ George Macy was in—only what I suppose. I never saw his reports. He didn't come to see me for any directions. I know Macy took the line down. When the line was built, I know there was a question as to the additional expense of putting the line on the wagon-road or on the railroad, and Palmer said he would rather pay this than not have the line. Who paid for the change, I don't know. I was authorized by Hillard to sell the wire to Palmer.

Plaintiff here asked the witness the following question: "Did you not sell this wire to Gen'l Palmer under the terms and provisions of a contract between the Union Pacific Railroad Co., eastern division, and defendants, & of which you state you took a copy, or had a copy furnished, and which is either this paper heretofore shown you, or a copy of it?"

To which the witness answered: "No, sir; the wire was sold to Palmer, with the understanding that they could pay for it or replace it, and I made out a bill of sale and sent it to Hibbard or Crowley. This wire was put up for the benefit of the Kansas Pacific Railroad Company.

The defendant operated it because I suppose the railroad co. had no power to maintain a commercial line. Our company did operate it, and receive proceeds."

Plaintiff here asked the witness the following question: "Did you operate it in violation of the rights of the other company or by permission of the railroad company?"

And the witness answered as follows: "We furnished the battery here for operating the line. I think we operated it with their permission."

Plaintiff then asked the witness this question: "State what the arrangement between you and Palmer for the erection of this line was."

The witness answered as follows: "That I should set a party to work to build the line from Denver eastward. I had the necessary implements here, and it was in pursuance of that arrangement that the wire was being constructed at the crossing of Blake and F sts., on or about April 18th, 1870."

Plaintiff, further to sustain the issues joined in his behalf, introduced CHARLES EYSER, who, being duly sworn, testified as follows;

Reside in this county, (Arapahoe;) lived in this city April 18th, 1870, (in Denver, Arapahoe County, Colorado Territory.) My occupation was carpenter and boarding-house keeper. Lived on Blake street; had a boarding-house on Blake street; my family managed it.

Plaintiff here asked the witness the following question: "What injuries, if any, did you receive on that day, and in what way and from what cause did you receive them?"

(To which question defendant objected, on the ground that plaintiff had not yet shown that the defendant had anything to do with the injury or any injury, and because it is not shown that the defendant had any connection with the wire.)

Plaintiff's attorney stated that "we have introduced evidence tending to show and connect the party defendant. We propose to show that Eyser was injured on the day named, in consequence of becoming entangled in the wire which was being stretched."

29 Plaintiff further says: "That he is not prepared to put in further proofs to connect defendant with the parties who put up the wire at this time, and asks leave to go into the residue of the case and produce further proof of the agency hereafter."

Permission to re-open proofs of agency by plaintiff hereafter was refused by the court; whereupon plaintiff renewed the question propounded to the witness, Eyser, as follows: "What injuries, if any, did you receive on the 18th of April, 1870, and from what source you received them, if any?"

(Defendant renewed the objection to the question that there was no sufficient evidence to prove the connection of defendant with the erection of the wire, or that the wire was erected by its agents.

The court overruled the objection, and defendant then and there excepted to the ruling of the court.

Defendant here moved the court to strike out all the testimony of the witness Woodward, because there is no evidence to show that Woodward was the agent of defendant, authorized to erect this wire, & acting within the scope of its authority; which motion was overruled by the court, and to which ruling of the court the defendant then and there excepted.)

Whereupon the witness Eyser answered as follows: "I was riding from my house on Blake street—the German House—to go to my son-in-law, close to bridge on Blake street. When I came on west side of

F street, crossing F, horse became entangled in the telegraph-wire and became unmanageable and fell with me. That is about all I know about it. I was senseless after I fell; was riding a young pony which we raised ourselves."

Plaintiff's counsel then asked the witness this question: "What was the character of that pony as to gentleness or otherwise?"

(To which the defendant objected on the ground that the question was suggestive; which objection was overruled by the court, and defendant then and there excepted to the ruling.)

The witness answered: "He was a gentle pony; was young though; so tame my children could all ride him."

Plaintiff then asked this witness the following question: "What was your condition as to liquor or otherwise?"

(To which question defendant objected, because suggestive. Objection overruled by the court, and defendant then and there took an exception to said ruling.)

The witness answered as follows: "I had drunk lager-beer that morning—no liquor—had taken four or five glasses between morning and dinner-time. I didn't see the wire before I was thrown. I saw a man to the left when I rode up on the pole. I mean by left, up F st.; think he was about 100 feet from the corner of F and Blake sts; should judge against the corner of Fillmore Block. Didn't know at the time I was thrown that they were putting up wires at the corner of F and Blake. I didn't see anything at corner of F and Blake to show that they were putting up wires there at the time I was thrown. I wasn't far from the gutter, on the west side of F st., till somebody on the right of me called out 'Charley, Charley;' seemed to be from Brendlinger's corner. It was just at the moment I struck the wire. I didn't hear the cry in time to enable me to hold up my horse and avoid the wire. Henry Kerr gave me the call of 'Charley, Charley.' Kerr was not in the employ of defendant. He was in the tobacco-store at that time. I was riding at a middling trot, as I call it, when I was thrown—an ordinary trot. When I came to myself, I found some teeth loose in my mouth, in back-jaw here, and in front a couple of teeth sticking in, and a part of jaw-bone broken. In consequence of the fall, I lost four teeth in all; two were loose, and two the doctor took out—two back teeth, and two upper front teeth. The loss of the teeth affects my speech. This leg here was badly bruised above the knee. Found out afterwards
31 that this thumb of left hand was dislocated. This was occasioned by the fall. I received injury in my right breast. When I came to I found myself up-stairs, in bed, at home, on Blake street. Don't know how I got there. I wasn't able to walk. Didn't come to till I was in my bed. I was confined to my bed about twenty-one days. After I left my bed I walked on crutches, more or less, about forty days. I suffered much pain—it was about three weeks—and forty days before I was able to go about and attend to business. I was attended by Doctor McClellan. Dr. McClellan was called immediately when it happened. He attended me about three weeks. Dr. McClellan made a charge for his services.

Plaintiff here asked the witness the following question: "Have you yet entirely recovered from these injuries?"

(Which question was objected to by defendant. Objection overruled by the court, and to which ruling defendant then and there took an exception.)

The witness answered as follows: "Not yet. By hard lifting my leg injures me, and my breath is not as free as it used to be. My thumb

hinders me a little, but I am used to it now; it's so long as two years. I was a carpenter and general contractor at the time of the accident; we had a job down at Sigi's.

Plaintiff here asked the following question: "What was your labor worth at that time per day?"

(Defendant objected to this question. The court overruled the objection, and defendant then and there excepted to the ruling.)

The witness answered as follows: "I got from $5 to $6 per day myself at that time. I paid hands $5 per day.

Cross-examination of witness EYSER:

On the cross-examination the witness, Eyser, testified as follows:

My house on Blake street is the 7th house from place where accident occurred, about middle of block. Got on the horse at my
32 house. The horse was a stallion—young. I heard somebody cry "Charley" when I was near the gutter—the water-ditch on west side of F street. The wire was on F street—on the west side of F street. Didn't swear on the former trial that I was near the gutter on east side of F st. when I heard the cry. I don't recollect making any such statement. I wasn't on east side of F st. when I heard the cry of Charley. I was about fifteen feet from the wire when I heard the cry; don't think further. I don't swear positively that I wasn't further off. It's about eighty feet across F street. When I left my house to ride that way I saw some folks at corner of F street. I see them every day there. My eyesight is good, but I have to use spec's to read. I am not near-sighted. I don't know how far I could have seen the wire if I had looked at it. If I had noticed the wire I might have seen it fifteen or twenty feet off; might further in the light overhead. I have no very definite idea how far I could have seen it. I didn't do anything when the man called "Charley." Horse became entangled, and I had to hold him, and he fell. I was riding at a slow trot. I am positive of this. I wasn't lopeing—I don't call it a lopo; I wasn't riding in a gallop. First discovered that thumb was hurt after I was a day or so in bed. I was hurt all over. I didn't swear on the former trial that I called Dr. McClellan's attention to it three or four weeks after I was hurt. It was the second or third day. I drank four or five glasses lager-beer that morning. I kept it in my own house to drink; drank it there; kept a bar there—liquors. The job at Sigi's was fixing horse-power, malt-mill, &c. I always had some fixing there. Wasn't working there at the time I was hurt. He wanted me to come over. It had been 5 or 6 weeks before this accident that I had been working for Sigi. I had an application before the accident to go to work for Crosset; to go into the country to help him in stable. I am following my business now; did last summer partly; am living in the country, and have built two or three houses out there this summer.

33 On re-examination witness testified: I hadn't spec's on at the time of the accident. It was about ¼ before 12 when the accident occurred.

WM. BURT, sworn in behalf of plaintiff, and testified as follows:

Reside in Park County now. In April, 1870, resided in Denver. Knew plaintiff by sight; saw him at the time of the accident. I was at the time standing on the west side of F street, at corner of Blake, on Brendlinger's corner. I saw the accident. Eyser (I believe it to be the same man) came passing along the street and they were putting this wire up.

It seems the wire was suspended between two poles and lowered away so that it came in about two feet of the ground. I took it to be that distance. I don't remember seeing Eyser further than a few feet—perhaps a rod—from the wire. I didn't see which street he came up, Blake or F. He was in a few feet of the wire, and his horse trotting. I don't think he was coming very rapidly. I think he was in a moderate trot. I saw him making an effort to cross the wire; at least, the horse was tangled in the wire. The horse turned after he got his leg over the wire and fell, and I think Eyser fell under him. Horse seemed to be frightened when the wire came up under his leg, and seemed to swing around; it threw him, and he fell, with Eyser under him. I next saw the crowd that collected; many that seemed to know Eyser. They picked him up. I approached near to him and see the blood running from his mouth. He seemed to be severely hurt. He seemed to be insensible. There were no precautions used there to prevent accidents that I saw. The horse fell from coming in contact with the wire, I think. This was at the intersection of Blake and F streets—the crossing of the streets.

Plaintiff here asked the witness this question: "What do you
34 say as to that crossing at that time, with reference to publicity, as compared with any other crossing in the city of Denver?"

(Which question was objected to by defendant, because it did not appear witness was competent to state, and that the question was leading. The objection was overruled by the court, and an exception then and there taken by defendant to said ruling.)

The witness answered as follows: "At that time I looked upon it as one of the principal business parts of the city. It attracted me more than any other part of the city. I was a painter at that time."

Cross-examination:

On cross-examination by defendant's counsel, the witness Burt testified as follows:

It appeared to me Eyser came against the wire near the middle of Blake street, a little nearer the Brendlinger corner than the other way, if any difference. I have a different recollection as to this; think the horse fell near the gutter running down F street across Blake. He fell near the middle of Blake street. The corner south from and opposite the Brendlinger corner has a book and segar store in it. Can't remember positively whether there was a post there on that corner or not. Think there was a sign-post there; not positive about that. There was a crossing over F street from the book-store to Brinker's corner; that is east of the book-store. I can't be mistaken as to when Eyser fell. He was in the street when I saw him. It appears to me he was near the centre of the street. He did not fall on the walk from book-store across F to Brinker's corner. I can't be mistaken about his falling in the street.

Cross-ex. here closed.

On re-examination by counsel for plaintiff, witness Burt testified as follows: "Not positive about whether there was a post there or not. My
attention wasn't directed to it. I am positive I saw a man thrown
35 there, and think it was plaintiff."

Major PEABODY sworn on behalf of plaintiff, and testified as follows:

I knew plaintiff. Can't say where I was on 18th of April, 1870; presume I was in Denver. I saw plaintiff when he was thrown from his horse at the time of the alleged accident. I was at corner of Blake and

F streets. I saw him riding along on his horse and he struck the telegraph-wire and was thrown and his horse thrown. I was at Peabody's store when he fell, about half a block from the place of the accident. I went down and saw him there. He was very badly hurt. The wire was the telegraph-wire. I couldn't say I saw the wire when the horse struck it. I saw them putting up wire and it was strung along the ground. I saw him when he fell. Knew he struck something—couldn't say if horse fell on him. He was insensible when I got there. I had noticed the construction of the wire that day. I saw no precautions at all; think horse was moving at an ordinary gate when he struck the wire.

Cross-examination of Major Peabody:

On cross-examination this witness testified as follows: "I looked to see if there were any precautions at the time of the accident and before. I could see from the store that there was no one there to keep people off the wire. I knew this by what I could see. I could see the workmen and other people standing around there, but no one to keep people off the wire, that I saw. Eyser fell near the corner of F and Blake, between the corner of Kassler's and First National Bank, diagonally across, should think nearer Kassler's than the other; think he didn't fall on the crosswalk from Kassler's to Brinker's. The horse didn't plunge across corner of sidewalk in front of Kassler's and fall on the crosswalk to Brinker's."

36 A. W. SMITH sworn and examined in behalf of plaintiff, and testified as follows:

I knew plaintiff in April, 1870. I lived in Denver at the time of the alleged accident to plaintiff. I was on Blake street, only a few feet from corner of Blake and F. I saw the accident. It was about eleven o'clock in the day, I should think. Saw plaintiff ride up Blake street, going towards bridge, riding a horse at an ordinary trot. As he was crossing the ditch, or just as he crossed it, horse struck a wire extended there—a telegraph-wire, I judge. It was, I should think, two and a half feet from the ground at the time he struck it. It struck the horse on his legs above the knees, as near as I could judge. He kept on a few feet before the wire brought him up; became frightened apparently, and reared and pitched and then turned to the left, crossed the corner of the street, between Kassler's store and the sign; also a telegraph-pole—I think there was one there—a telegraph-pole. I am sure there was a pole there of some sort. He crossed over the corner and across the ditch and fell a few feet beyond the ditch in F street. Saw Eyser immediately after. He lay on the ground insensible. Didn't see any blood. I saw no precautions against accidents. It might have been a half an hour after they commenced crossing the street with the wire, that this accident occur'ed. I stood there some time watching the operation.

Cross-examination of witness Smith:

On the cross-examination witness Smith testified as follows: "Some time during this half hour the wire was on the ground and sometimes elevated fifteen feet. It wasn't permanent *no* time—it was up and down—it was brought up from the ground between the time he struck it, as near as I can remember now. The horse first came in contact with the wire, I think, near the middle of Blake street, nearer the corner of Kassler's store, I should judge. He fell just above the crossing, I should judge, from Kassler's to Brinker's, and a few feet from the ditch

37 or gutter—the gutter towards the bridge. The horse, when he crossed the corner, was in the *bite* of the wire. He carried till nearly the time he fell, I should judge—he went a number of feet

before it brought him up, and that left considerable slack. I don't think he got over the wire and then came back on it. There was a good deal of slack there; the wire wasn't stretched tight. It was only two or three feet from the ground and at top of poles on each side. It was about two feet or two and a half feet from the ground at the time the horse struck it. I am not entirely certain horse didn't get over the wire. It's the best of my recollection, from what I saw, that he didn't. I heard somebody call to him; he hallooed to him. I think he was eight or ten feet from the wire when he hallooed to him. Street is 80 feet wide. I can't say that I heard Kerr call to him or whether I heard it said that he did. I think plaintiff was between the center of Blake street and the ditch when I called to him. If he was in the center I should think it would be over ten feet from the wire and not over fifteen feet. I didn't hear any warnings to plaintiff before he got into F st. at all. I am positive he was riding in a trot; sure of it. I was looking at Eyser when I called to him. He looked around one way and the other to see who was calling and came right ahead. Don't think he made any attempt to stop his horse. The call wasn't to stop but merely his name. I heard some on' call 'Charley, Charley.' I didn't hear the word 'stop' that I recollect of. There were considerable many people there; more than usual. If I was looking for one, knowing there was a wire there, I could probably see it distinctly across the street."

On re-examination by plaintiff's counsel the witness (Smith) testified as follows: Eyser was to the best of my recollection between the reservoir and the ditch then, or the wire, when the warning was given.

38 Plaintiff's counsel here asked the witness this question: "On whose behalf did you give the warning?"

(To which question defendant's counsel objected, which objection was overruled by the court, and an exception then and there taken by defendant to said ruling.)

The witness answered: "It was intended to save Eyser from trouble."

Plaintiff's counsel here asked the witness this question: "Was it in your own behalf or in behalf of those who were putting up the wire at the time?"

(To which question defendants objected, which objection was overruled by the court, and an exception then and there taken for defendant to said ruling.)

The witness answered as follows: "I can't say my motive or feelings; probably general principles."

Plaintiff's counsel here asked the following question: "Were you or not acting at the time in behalf on the persons who were putting up the wire?"

(To which question defendant, by counsel, objected as new matter and not proper, which objection the court overruled. Defendant then and there excepted to the ruling.)

And the witness answered: "I was not."

JOSEPH KOCH sworn and examined in behalf of plaintiff and testified as follows:

Have known plaintiff over six years. In April, 1870, was here in Denver; saw this alleged accident. I was near Colorado House and they commenced calling at corner of Kassler's; then I came back and saw plaintiff lying there, not far from the sidewalk on F st., near corner of Blake. He was lying half-dead, I thought; didn't move and badly bruised; didn't know if alive or not at first. He lay not very long. I

helped carry him home on a shutter. Think Henry Kerr also helped. Don't know how many helped carry him. We carried him to his boarding-house—his residence, where he was living then. He had not become conscious before we put him on a shutter that I know of. We carried him the entire distance to his house—the German House—from
39 where he fell. When we got there we brought him up-stairs in bed. I believe we had him on shutter yet and when we carried him up-stairs he made an attempt to walk and couldn't. I laid him in bed. He didn't walk. I remained till a physician came; that was Dr. McClelland came. He was the first one. Then McClellan made examination. He felt his jaw-bone.

Plaintiff's counsel here asked the witness this question: "What did he find?"

(Defendant's counsel objected to the question.)

The witness answered to the court: "I was present at this examination."

Whereupon the court overruled defendant's objection.

Defendant then and there took an exception and the witness answered: "He found three teeth loose. He took one out I believe. He was working at it; after that he cut open pants and found a great bruise on the thigh bone; right leg I believe it was. I remained there about two hours I think; don't know exactly. During this time Eyser was insensible and seemed to suffer a great deal. I returned again towards evening but was not there long. I saw him; he was in kind of half sleep when I came there. I was there before supper. Don't remember I was there afterwards. When I first saw him in the street he had already been thrown. I saw the wire when I passed down to dinner. That was not quite ten minutes I guess before I saw Charley lying there. I was not far above the ground when I first saw it. I was right by it. Don't remember how long plaintiff was confined to bed or room.

Cross-examination:

On cross-examination the witness testified as follows: "I was looking at Dr. McClellan when he made the examination. I didn't see him take out the three teeth. He said the teeth were loose and he was working at them. McClellan said he was in great pain. I know it, too, by the suffering he showed; he appeared so. He was insensible. I took it he was in pain by what I have seen. I can't state the fact like a doctor. He appeared like he had pain. Didn't do anything. I could see
40 he had pain. Believe when he got in house he tried to walk and he couldn't. I know that he made an attempt by moving. I couldn't say who helped him up-stairs; others helped. Don't know as Kerr was there or not. Kerr was then on the front of the shutter, as much as I remember. We carried plaintiff up-stairs on the shutter. To my knowledge he didn't walk up-stairs. I don't think he did walk up-stairs. I am no doctor. Have talked with plaintiff about this case pretty often. Have talked with him about this case. He never told me what he wanted me to swear about the case.

On re-examination, this witness testified as follows: We are all acquaintances, and I have been to plaintiff's house to little parties, and helped him along.

JOHN KAUFFMAN sworn and examined on behalf of plaintiff, and testified as follows:

Know plaintiff; I am his son-in-law. Didn't see the accident to him.

Helped to carry him home; found him near corner of F and Blake streets on shutter; I spoke to him when I came, but he couldn't answer; he was insensible. I helped take him home; laid him on bed in the lower floor first; he stayed there half an hour, perhaps, and I went for a doctor; when I came back they were making preparations to take him up stairs; a man by name of Klutz and another man were trying to lead him up stairs; he failed in trying to go up stairs; he couldn't walk, so we had to half carry and drag him up. Dr. McClellan was there then; I believe it was at his request we took him up stairs; Dr. McClellan made an examination; I wasn't present at this examination; I examined his person afterwards. About eleven o'clock p. m. we put wet sponges on his wounds; I found his leg was bruised above the knee; couldn't tell exactly to what extent; it appeared to be of the color of the rainbow; saw breast was black and blue; saw blood running out of his mouth when we had him on the shutter. Eyser was confined to
41 his bed for two weeks, certain; at least that *that* he was in bed not able to be out at all. When he got up he went on crutches for eighteen or nineteen days; I don't know exactly. After that he was convalescent; he wasn't able to do anything for some time after that; couldn't say how long it was after he could walk without crutches before he could resume work; that to the best of my knowledge and belief it was four weeks.

Cross-examined:

On cross-examination, witness Kauffman testified as follows: Eyser, when we got him to the house, was laid on bed; after that two men had to help him up stairs; he tried to walk, but couldn't; he didn't speak to me that day; I can't tell whether a man who can make an effort to walk up stairs is sensible or not.

L. McCARTY sworn and examined by plaintiff and testified as follows; I was present a few moments after the accident; saw a wire there: when I came up Eyser was lying on the ground.

Plaintiff's counsel here asked the witness the question: What was the condition of the wire?

(To which question defendant's counsel objected, on the ground that the condition of the wire at the time of the accident could not be shown by proof of the condition afterwards; which objection was overruled by the court and the proof admitted, as tending to show the degree of negligence, and an exception to the ruling then and there taken by defendant.)

The witness answered as follows: I couldn't say how high it was up, but to the best of my knowledge now it was probably two feet high. I think I remained five or ten minutes; the wire remained in the same condition it was when I first came there; I recognized Eyser then; I was in a buggy with horses when I came there.

Defendant's counsel here move to strike out all of the witness's answer to question touching condition of wire at the time he arrived on the ground; that it did not tend to prove the degree of negligence;
42 which motion was overruled by the court, and to which ruling defendant then and there took an exception.

Cross-examination:

On cross-examination this witness testified as follows: It can't have been more than from a minute to three minutes after the accident that I saw Eyser on the ground. At time of the accident I was only forty or fifty yards below the place of it; I was going up the street in a trot,

with a pair of horses; don't suppose I was more than a minute in getting up; all the way I could tell about when accident occur'ed is that I met his horse forty yards below; I didn't stop until I got up there

Doctor McCLELLAN sworn and testified in behalf on plaintiff as follows: I reside in the city of Denver, since 1862; am a physician and surgeon; know plaintiff; I was called to him professionally about April, 1870; it was the 18th day of April I went. Found him on his bed in the upper story of his house. Made an examination of his person. The first thing I noticed he was in a comatose state; couldn't arouse him. This continued till about nine o'clock a. m. next day—I think in more or less degree not so fully. I satisfied myself this resulted from concussion of the brain by an inspection and examination. I found his mouth full of blood. Examined his mouth carefully and also the chest. The blood came from the mouth and not from the lungs. I removed two of the back teeth with the olocolor process which the teeth set in. Its really part of the jaw; it came out with the teeth. Also found two of his incisors were fractured; they were very loose; I tried to preserve them; subsequently maceration took place and I had to remove them. The examination of the lungs at the same time showed that there was more or less congestion and obstruction of breathing, which ultimately resulted in inflam'ation of the pleura, which lasted about ten days; was compelled to bandage him so he could breathe.

This was all at the same examination. I stripped him and ex-
43 amined his whole body. No other injury except scratches found until I came to the inside of right knee and thigh. I found there a very large contusion. Found on examination it had killed the circulation of the skin and entire cellular tissue, which resulted in a large slough exposing the muscels. Found no other injury then. He called attention to something afterwards. It was necessary for me to visit this patient once & twice a day till about 29th May. The last eight days of this time was there about every other day. When I left him he was still bedfast; sitting up a little, and rolled about in a chair; not able to walk. I saw him frequently after, and attended him. After he got in the street, he walked on a crutch and cane. That condition of things, I think, must have lasted about two months. I charged for these visits of mine.

Defendant's counsel here move to strike out last answer of witness, which motion was overruled by the court and an exception then and there taken by defendant to said ruling.

Plaintiff then asked the witness the question: "To what extent?"

(To which defendant's counsel objected. Objection overruled by the court, and an exception then & there taken by defendant.)

The witness answered: $150; against Charles Eyser; none of it has been paid.

Plaintiff's counsel here asked the witness this question: "Do you hold plaintiff liable to pay this $150?"

(To which defendant's counsel objected, which objection was sustained by the court, and plaintiff's counsel then and there excepted to said ruling.)

The witness then testified as follows: "I made a thorough examination of plaintiff as to his condition in respect to intoxication. The object of examination was to ascertain whether his brain was merely muddled from effects of alcohol or deranged by physical difficulty. I was very careful; endeavored to smell; examined his breath and mouth,
44 and satisfied myself he was not under the influence of liquor.

Plaintiff's counsel here asked the witness this question: "Has Eyser promised to pay you this debt?"

(To which defendant's counsel objected. The objection was overuled by the court, and defendant's counsel then and there took an exception to said ruling.)

The witness answered: "He has."

Cross-examination:

On cross-examination the witness (Dr. McClellan) testified as follows: Eyser hadn't been drinking anything that morning, so far as I could discover. I couldn't tell about beer. My examination was made in order that I wouldn't make a mistake as to his condition. I made the examination as a physician and surgeon. Couldn't detect that he had been drinking beer. I can't tell about the smell of beer. I examined for all alcoholic drinks, which united with the spittle, and when a man uses tobacco has a smell very sickening to me, and my smell is very acute to detect it. I can't tell whether he had been drinking beer or not; I can swear that I detected no alcoholic stimulant upon him. As to malt liquor I don't know. By alcoholic stimulant I mean anything that has alcohol in it.

Defendant here asked this question: "Do you swear that plaintiff had not been drinking any intoxicating liquor?"

To which witness answered: "I don't know whether he had been drinking or not; I don't know what you mean by intoxicating liquor. I didn't detect presence of alcohol in his breath."

Defendant asked the witness: "Do you know whether a man may become intoxicated from drinking beer?"

And the witness answered: "I think a man might become a little funny, legs might become weak, but his brain is generally pretty
45 sound, I think. The effect of the fall then producing insensibility would in all probability complicate the effect of intoxication. It might make the coma a little deeper till the intoxication passed off; don't think it would change the odor of the breath unless to make it worse. I don't know but a man might become intoxicated on beer. Think he'd have to drink a good deal; have seen Germans drink a good deal without intoxication ensuing. Don't think it affects the brain. There may possibly be alcohol in beer. I doubt whether there is any of any account. I don't know whether there is or is not. I said that the effect of a concussion would be to render coma more profound till after the intoxication passed off. I said that I did not think it would affect the smell. I found plaintiff's mouth full of blood. Alcohol enters the blood, the blood is carried to the lungs and comes in contact with the air and passes off. It never is assimilated or digested, and the blood in mouth wouldn't change the smell unless there was blood enough to cut off his breath. Blood has a smell altogether different from the smell of liquor. Before I made an examination for liquor I cleansed the mouth and removed all the blood. I doubt if it would have made a change in the breath if I hadn't. It was about 12 o'clock that I cleansed his mouth and examined his breath. This was the second thing I did, I think."

HANNAH EYSER sworn on behalf of plaintiff, & testified as follows:

"In Ap'l, 1870, I was living at German House on Blake street. I am plaintiff's daughter. I saw my father the day he was thrown. I saw him as they were bringing him to house. I didn't see them taking him up to his bed. Saw him as soon as Dr. McClellan came. I don't know

what his condition was. He lay abed about three weeks. He suffered much during that time. He appeared to be suffering a great deal. He wasn't able to wait on himself."

46 H. Z. SALOMON sworn on behalf of plaintiff, & testified as follows:

"I was present at the time Eyser was thrown. I saw him riding down Blake street, across F; at the crossing of F and Blake there was a telegraph-wire across; as he rode by his horse got tangled in the wire. Horse reared around considerable, then he finally came opposite the corner of Kassler's store and then throwed him. At the time of his being thrown I did not observe any signals against accidents. There was some halloing, I think; I ain't positive, though. Eyser was thrown immediately after the call. The call and the fall came about the same time. Eyser was going at a pretty good gait, a kind of a lope. He was travelling about the same rate of speed that people on horseback usually do—nothing unusual. I have lived in Denver about thirteen years, merchandising all the time. This has been my home. My business has required me to use the public streets in Denver during that time."

Plaintiff's counsel here asked the witness this question: "During that time in what way have Blake and F streets been used?

(Which question was objected to by defendant because it is immaterial. The objection was overruled by the court, and defendant then and there excepted to the ruling.)

And the witness answered as follows: "As public th'roughfares."

Plaintiff's counsel then asked the witness this question: "What was the character of that crossing of Blake and F streets as to whether much or little traveled, at the time of the accident?"

(To which defendant's counsel objected because leading. Objection overruled by the court, and an exception to the ruling then and there taken by defendant to said ruling.)

And the witness answered as follows: "One of the most principal th'roughfares in the city, I think. I saw Eyser after his fall. He was senseless. Saw blood coming out of his mouth and nose. Didn't make any examination of him."

Cross-examination:

47 On cross-examination this witness testified as follows:

When I first saw Eyser he was right in F street as I crossed. I crossed to the lower corner of Blake and F. Can't say exactly where he was was when I first saw him. The wire was on the opposite side of F, the west side; Eyser when I first saw him was right in the middle of this street, probably fifteen or twenty feet from the wire. I couldn't exactly determine, because it was all as quick as that. The street was eighty feet wide. I can't say positively where in the street he was. He was going in a lope. I heard cries & saw horse entangled in the wire about the same time. I didn't hear the cry when I first saw Eyser. I couldn't say whether I heard more than one cry positively; I suppose there did more than one person cry. When I saw this I was going across Blake st.; on F, coming from S. side to my store, going from what was then Brinker's store to my store. Couldn't say positively whereabouts I was when he fell. Eyser fell on the upper crossing of F street from Kassler's to Brinker's. The horse first struck wire very close to Kassler's corner; think there was a post at Kassler's corner; can't say which side of the post the wire was. He didn't after he struck

the wire come across the corner of the sidewalk at Kassler's store and then get back onto the wire. Think the horse did go onto the sidewalk. The horse's feet were entangled in the wire. He dragged the wire with him. Don't know as he carried the wire around the post or that there was a post there, but I saw him entangled in the wire, and I saw him fall on the sidewalk—the horse—& Eyser fell on the crossing. There was a great crowd there. Didn't notice what kind of a crowd it was. Didn't notice any crowd before the accident. At the time of the accident a great many collected around him, but I don't know where from; I didn't look to see.

Plaintiff, by counsel, here offer' in evidence section 1 of an ordi-
48 'ance concerning streets and alleys, on page 121 of published ordinances of city of Denver, A. D. 1866, which reads as follows:

"Be it ordained by the city council of the city of Denver, that no person shall encumber or obstruct any street, alley, or other public place, by placing therein or thereon any building materials or any article or thing whatsoever, without first having obtained permission from the mayor or street commissioner, under penalty of ten dollars for each offense, and a further penalty of three dollars for each day such incumbrance or obstruction shall continue."

Plaintiff also offered in evidence section' 7 and 21 of an ordinance establishing the grades of the streets of the East Division on the city of Denver, on pages 125 & 136, of same book of ordinances, pub. 1866, which read as follows:

"SEC. 7. That the grade of Blake street be, and the same is hereby, established as follows: Commencing at the center of said street, where the east line of L street intersects said street at an elevation of thirty-one (31) and sixty-two one-hundredths ($\frac{62}{100}$) feet above low-water mark of the South Platte River; thence level across said L street; thence descending on a uniform grade in a southwesterly direction along the center of said street one (1) and two hundred and eighty-seven four-hundredths ($\frac{287}{400}$) feet per hundred to the east side of K street, to an elevation of twenty-four (24) and seventy-five one-hundredths ($\frac{75}{100}$) feet above low-water mark in the South Platte River; thence level across said K street; thence descending eleven-fiftieth ($\frac{11}{50}$) feet per hundred to the east side of I street, to an elevation of twenty-three (23) and eighty-seven one-hundredths ($\frac{87}{100}$) feet above low-water mark of the South Platte River; thence level across said I street; thence ascending fifty-three one-hundredths ($\frac{53}{100}$) feet per one hundred to the east side of H street, to an elevation of twenty-one (21) and twenty-five one-hundredths ($\frac{25}{100}$) feet below low-water mark of the South Platte River; thence level across H street; thence descending two (2) and thirteen four-hundredths ($\frac{13}{400}$) feet per hundred to the east side of G street
49 to an elevation of thirteen and twelve one-hundredths ($\frac{12}{100}$) feet above low-water mark of the South Platte River; thence level across said G street; thence ascending seven-eighths ($\frac{7}{8}$) feet per hundred to the east side of F st., to an elevation of sixteen (16) and sixty-two one-hundredths feet above low-water mark of the South Platte River; thence level across said F street; thence ascending to the east bank of Cherry Creek to an elevation of eighteen (18) feet above the low-water mark of the South Platte River."

Section 21 of same ordinance reads as follows:

"SEC. 21. That the grade of F street be, and the same is hereby, es tablished as follows: Commencing at the centre of said street, where the east line of Parkinson street intersects said street at an elevation of sixty-one (61) and sixty-eight one-hundredths ($\frac{68}{100}$) feet above low-

water mark of the South Platte River; thence level across said street; thence descending on a uniform grade along the centre of said street in a northwesterly direction one (1) and nine hundred and fifty-four one-thousandths ($\frac{954}{1000}$) feet per hundred to the east side of Wazoola street, to an elevation of fifty-six (56) and forty-six one-hundredths ($\frac{46}{100}$) feet above low-water mark of the South Platte River; thence level across said Wazoola street; thence descending one (1) and one hundred and forty-seven one-thousandths ($\frac{147}{1000}$) feet per hundred to the east line of Clancey street to an elevation of fifty-three (53) and forty one-hundredths ($\frac{40}{100}$) feet above low-water mark of the South Platte River; thence level across said Clancey street; thence descending three hundred and twenty-six one-thousandths ($\frac{326}{1000}$) feet per hundred to the east side of Glenarm street to an elevation of fifty-two (52) and fifty-three one-hundredths ($\frac{53}{100}$) feet above low-water mark of the South Platte River; thence level across said Glenarm street; thence descending eight hundred and eighty-five one-thousandths feet per hundred ($\frac{885}{1000}$) to the east side of Welton street to an elevation of fifty (50) and seventeen one-hundredths ($\frac{17}{100}$) feet above low-water mark of the South
50 Platte River; thence level across said Welton street; thence descending six hundred and twenty-six one-thousandths ($\frac{626}{1000}$) feet per hundred to the east side of California street, to an elevation of forty-eight (48) and fifty one-hundredths ($\frac{50}{100}$) feet above low-water mark of the South Platte River; thence level across said California street, descending six hundred and fifty-five one-thousandths ($\frac{655}{1000}$) feet per hundred to the east side of Stout street, to an elevation of forty-six (46) and seventy-five one-hundredths ($\frac{75}{100}$) feet above low-water mark of the South Platte River; thence level across said street; thence ascending two hundred and seventy-one one-thousandths ($\frac{271}{1000}$) feet per hundred to the east side of Champa street to an elevation of forty-six (46) feet above low-water mark of the South Platte River; thence level across said Champa street; thence descending one (1) and one hundred and twenty-five one-thousandths ($\frac{125}{1000}$) feet per hundred to the east side of Curtis street to an elevation of forty-three (43) feet above low-water mark of the South Platte River; thence level across said Curtis street; thence descending nine hundred and thirty-seven one-thousandths ($\frac{937}{1000}$) feet per hundred to the east side of Arapahoe, to an elevation of forty (40) and fifty one-hundredths ($\frac{50}{100}$) feet above low-water mark of the South Platte River; thence descending across said Arapahoe street twenty one-hundredths ($\frac{20}{100}$) feet per hundred to the west side of said street to an elevation of forty (40) and twenty-five one-hundredths ($\frac{25}{100}$) feet above low-water mark of the South Platte River; thence descending six hundred and fifty-five one thousandths ($\frac{655}{1000}$) feet per hundred to the east line of Lawrence street, to an elevation of thirty-eight (38) feet above low-water mark of the South Platte River; thence descending across said street twenty one-hundredths ($\frac{20}{100}$) feet per hundred to the west line of said street, to an elevation of thirty-seven (37) and seventy-five one-hundredths ($\frac{75}{100}$) feet above low-water mark of the South Platte River; thence descending one (1) and two hundred and eighty-eight one-thousandths feet ($\frac{288}{100}$) per hundred to the east side of Larimer street to an elevation of thirty-three (33) feet above low-water mark of
51 the South Platte River; thence descending one (1) and one-fifth ($\frac{1}{5}$) feet per hundred to the west side of said street, to an elevation of thirty-two (32) feet above low-water mark of the South Platte River; thence descending three (3) and ninety-three one-hundredths ($\frac{93}{100}$) feet to the east side of Holliday street, to an elevation twenty-one (21) and seventy-five one-hundredths ($\frac{75}{100}$) feet above low-water mark of the

South Platte River; thence level across said Holliday street; thence descending one (1) & *one one* eight hundred and seventy-five thousandths ($\frac{875}{1000}$) feet per hundred to the east side of Blake street, to an elevation of sixteen (16) and seventy-five hundredths ($\frac{75}{100}$) above low-water mark of the South Platte River; thence descending across said street three hundred and fifty-two one-thousandths ($\frac{352}{1000}$) feet per hundred to the west side of Blake street to an elevation of sixteen (16) and fifty one-hundredths ($\frac{50}{100}$) feet above low-water mark of the South Platte River; thence descending seventy-five one-hundredths feet ($\frac{75}{100}$) per hundred to the east side of Wazee street to an elevation of fourteen (14) and fifty one-hundredths ($\frac{50}{100}$) feet above low-water mark of the South Platte River; thence level across said Wazee street; thence descending one (1) and six hundred & eighty-seven one-thousandths ($\frac{687}{1000}$) feet per one hundred to the east side of Wyncoop street, to an elevation (10) ten feet above low-water mark of the South Platte River; thence level across said Wyncoop street; thence descending two hundred and eighty-seven one-thousandths ($\frac{287}{1000}$) per hundred to the east side of Wiawatta street to an elevation of nine (9) and twenty-five one-hundredths ($\frac{25}{100}$) feet above low-water mark of the South Platte River; thence level across said Wiawatta street; thence descending two hundred and eighty-one one-thousandths ($\frac{281}{1000}$) feet per one hundred to the east side of Delgany street to an elevation of eight (8) and fifty one-hundredths ($\frac{50}{100}$) feet above low-water mark of the South Platte River; thence level across said Delgany street; thence descending two hundred and eighty-one one-thousandths ($\frac{281}{1000}$) feet per hundred to the east side of
52 Williams street to an elevation of seven (7) and seventy-five one-hundredths ($\frac{75}{100}$) feet above low-water mark of the South Platte River; thence level across said Williams street; thence descending two hundred and eighty-one one-thousandths ($\frac{281}{1000}$) feet per hundred to the east side of Bassett street to an elevation of seven (7) feet above low-water mark of the South Platte River."

To the reading of which ordinances in evidence, defendant, by counsel, objected for the reasons: 1st. No proof of the adoption of these ordinances or of their publication according to the provisions of the charter. 2nd. No proof that they were in force when the accident occurred. 3d. That sec. 1 of the first ordinance is immaterial, and improper to go to the jury; that it relates to a police regulation, and there is no proof that it has been violated, or that defendant did not have any permission under it; whereupon the court overruled said objection, ruling that said ordinances might be read in evidence in connection with the title page, preface, and concluding ordinance.

To which said ruling of the court the said defendant then and there excepted. The title page, preface, and concluding ordinance, included and referred to in the last foregoing exception, read as follows:

"The charter and ordinances of the city of Denver, as adopted since the incorporation of the city and its organization, Nov., 1861, to the first day of April, A. D. 1866, revised and amended, together with an act of the legislature of the Territory of Colorado, in relation to municipal corporations, compiled and revised by B. B. Stiles, city clerk. Denver. Byers & Dailey, News Office, printers, 1866."

The preface referred to reads as follows:

"PREFACE.

"The city of Denver was incorporated by act of the legislature in November, 1861, and in 1862 the first volume of city ordinances was

published. Since the publication of that volume the city charter has been twice amended, making many of the officers of the city government appointed by the city council, who where elected by the people under the first charter, thereby rendering many of the ordinances
53 nugatory, and requiring others to be enacted to meet the requirements of the amended charter. So many changes having been made in the charter and ordinances, it was thought best by the city counsel to have the whole revised, and on the 28th day of December the undersigned was appointed, by resolution of the city council, to revise and prepare the same for publication. In obedience to the requirements of the resolution of the council, I prepared a bill entitled 'An act to reduce the law incorporating the city of Denver and the several acts amendatory thereto, into one act, and to amend the same,' and had it presented in the territorial legislature then in session; which act passed and became a law. The new charter is, in many respects, an improvement upon the old, giving the city, as a municipal corporation, a right to hold lands by deed, gift, grant, devise, and amending it in other respects to secure the rights of the citizens under the charter. The ordinances published in this volume, most of them, have been the code of city laws since its organization, and have been found adequate to secure the rights of the citizen, and to maintain good order and good government within the city without oppression to the well-disposed, and ample for the punishment of crime. The labor of compiling this volume of ordinances has been onerous beyond what was expected, from the fact that hardly an original ordinance remained which had not been amended. I do not flatter myself that this volume is complete or perfect, but that an indulgent public will attribute such faults as may be found to the difficulties arising in the preparation of such a work which usually takes years to remedy. To the city council I tender my grateful acknowledgements for their kindness and courtesy, and hope and trust that my labors in revising the ordinances of the city will result in much good to the citizens of Denver and the growth and prosperity of the city.

"B. B. STILES,
"*City Clerk.*

"DENVER, *March* 20, 1866."

The concluding ordinance included in the last foregoing objec-
54 tion of defendant, reads as follows, [to wit:]

"AN ORDINANCE concerning the published volume of ordinances.

"SECTION 1. Be it ordained by the city council of the city of Denver, that the following ordinances severally described by the captions printed and contained in the preceding pages, that is to say, in a book entitled 'Ordinances,' by Byers and Dailey, and published by order of the city council, and purporting to be 'the charter of the city of Denver,' and the ordinances of said city from its organization, November, 1861, to the 25th day of July, A. D. 1866, inclusive, together with an act of the legislature of the Territory of Colorado concerning municipal corporations, compiled, revised, and published by order of the city council, by B. B. Stiles, city clerk, be, and the same are hereby, ordained and passed by the city council of the city of Denver, that is to say:

* * * * * * *

"Chapter 18. An ordinance concerning streets and alleys.

"Chap. 19. An ordinance establishing the grade of certain streets of East Denver.

* * * * * * *

"SECTION 2. That all ordinances of the city of Denver heretofore passed in relation to the subject-matter of, or inconsistent with, any of the ordinances named in section one of this ordinance be, and the same are hereby, severally repealed; provided that such repeal shall not effect any act done, or right accruing or accrued, or established, or any suit, action, or proceeding had or commenced in any cause before the time when said repeal shall take effect, nor any offence committed, nor any penalty or forfeiture incurred, nor any suit or prosecution pending at the time of such repeal for any offense committed, or for the recovery of any forfeiture or penalty incurred under any of the ordinances so repealed.

"SEC. 3. That all ordinances of the city council of the city of Denver, including this ordinance, contained in book aforesaid, entitled 'Ordinances,' purporting to contain 'the charter of the city of Denver,' together with the ordinances of said city from its organization, November, 1861, to the 25th day of July, A. D. 1866, inclusive, and an act of the legislature of the Territory of Colorado concerning municipal
55 corporations, compiled, revised, and published by order of the city council, by B. B. Stiles, city clerk, be, and the same are hereby, declared to be the ordinances of the city of Denver now in force, presented and published by authority of the city council of the city of Denver.

"SECTION 4. This ordinance shall take effect and be in force from and after the 25th day of July, A. D. 1866.

"M. M. DELANO, *Mayor.*

"Passed July 5, A. D. 1866.

"Attest:

"B. B. STILES, *City Clerk.*"

Plaintiff's testimony closed.

HENRY KERR sworn on behalf of defendant, and testified as follows:

I was present at the accident to plaintiff; was standing at west corner of Blake and F streets; saw the plaintiff as he approached, coming up Blake street, riding towards Cherry Creek; saw the wire at the time. The wire was stretched along the gutter of F across Blake street. The wire, when I first saw Eyser, was stretched a foot and a half or two feet high. It may have been highest at Kassler's corner than at the other. Couldn't say how tight it was stretched; don't know what was being done with it when I first saw Eyser; saw afterwards they were putting it up. I didn't see at the time any one doing anything with it. When I first saw Eyser he was probably a little this side of the middle of F and on the crossing of Blake and F. There is a reservoir there, about the middle of the four corners, at the crossing, and he was a little this side of the middle of the reservoir, nearer the wire. Think he was on the reservoir; think the front part of the horse was nearer the wire than the reservoir; think his fore feet might have been off reservoir; hind feet might have been on the plank; think he was from fifteen to eighteen feet from the wire, more or less. When I first saw him he was in a lope, or gallop. I hallooed to him to look out, and he then checked his horse, and his horse then struck a trot and struck the wire. I helped carry him home. As we were carrying him he looked to me
56 insensible. We took him into the dining-room at his house. There is a door there up-stairs. Then he got off the shutter. He

walked up-stairs into his bed-room. I walked up behind him. Did not notice any one in front of him then. He walked up himself, supporting himself on each side with his hands. Think he got off shutter himself, so far as I can recollect now. I was there when doctor arrived; don't know how long that was after. When doctor came in he put his hand in his mouth and pulled out a bone or a tooth, and then I left.

JOS. E. BATES sworn on behalf of defendant and testified as follows: Reside at Denver, and did about April 18th, 1870. Was present at the corner of Blake and F at the time of this accident to plaintiff. I don't know that I can describe the situation of the wire across Blake street at or about the time of the accident. I saw the plaintiff about that time. Saw him, I should presume, it might have been two minutes before the accident, I had merely stopped at the corner. I saw Eyser riding an unmanageable horse, as I thought—a colt—and stopped to watch the performance. He didn't seem to have much control of him, and I was watching him; I was afraid he would get thrown. When I first saw Eyser I think he was between the 1st National Bank and Martin's or Brinker's corner. I know where the wire was. It was on the other side of the street. He was about the width of the street from the wire when I first saw him. The street, I think, is 80 feet wide. When I first saw him, the horse didn't seem inclined to move forward much, and he was urging him. The horse seemed to me to be just being brought into use; when he would strike him the horse would seem to go beyond his control—seemed to be unmanageable. The horse kept on Blake street. He crossed F street, then at the corner he passed across F street, as near as I can recollect, and across the walk. At that time he wheeled and went right across to Kassler's store, on to the walk. That being then on Blake, as he came on to the walk turned to left, as near as
57 I can remember, and sprung right towards F street, coming in contact with the wire as he passed into the street. The horse, I took it, was beyond control of Eyser or any one else from the way he went. He was going towards bridge across Cherry Creek, and turned after passing walk on F across Blake. He had passed the wire and got beyond it on Blake, and then took a change in towards building, and then made a change towards F, as near as I can recollect it, and then struck the wire. I was watching him all the time, because I was afraid he would get hurt. I saw him when he first came in contact with the wire. I don't remember of his coming in contact with the wire on Blake street. I saw plaintiff when passing on Blake street. He came to where the wire was. The conduct of horse when he came into the locality of the wire seemed to be very wild—unmanageable. As he approached the wire, after I first saw him, the horse was rearing and plunging & jumping, and the conduct of the rider about that of any other man on such a horse. Don't remember I have had any talk with plaintiff about that transaction since it occurred. My opportunity of seeing what was going on then was good. There was quite a number of men gathered around; some of them were in front of me; I stood right on the corner of Blake and F st. Don't know how long the wire had been elevated. Saw workmen there at work. Don't know that I heard any warnings to plaintiff as he approached the wire.

Cross-examination:

On cross-examination witness Bates testified as follows: As near as I can remember, but I am not positive about it at all, the wire was in middle of Blake street when Charley passed it; going towards bridge

was in this condition. On the corner of Brendlinger's store the wire was at the top of post; then at Kassler's corner, as near as I can remember, the wire was dropped down within two feet of the ground, probably at centre of street, and when the horse passed under it the wire was higher. As near as I can recollect he passed under the wire near Brendlinger's corner; not positive as to this, because I
58 didn't charge my memory with it. Think neither horse nor rider came in contact with the wire as they passed towards Cherry Creek. The horse had, I think, just passed the walk on F street, when he wheeled and went towards Kassler's building, and on to the sidewalk, and then out into F street, and then came in contact with the wire. I talked with Woodward about this this forenoon. Think Woodward spoke to me about this before. The only talk I had with Woodward this forenoon was as to the time this occurred. Can't tell whether this former conversation with Woodward was before the former trial or not. What I have stated is what occurred then, as I observed it, to the best of my recollection. Blake street is 80 feet wide. Don't know the height of the pole at Brendlinger's corner, on which wire was elevated; should presume it was 30 feet high. Think Eyser went within five feet of Brendlinger's corner; within feet from the curb. Think the first talk with Woodward was some time last summer; and I think I had one shortly after the occurrence. Don't know why I wasn't examined at the former trial. Think, at first talk after this, that Woodward told me he should want me as a witness; don't know as I was in the city at the time of the former trial. Think, at the first talk with Woodward, I told him what I saw, as I have detailed it here. There was no allusion this morning in our talk as to what I would swear to. To best of my knowledge and belief, the first time the horse came in contact with the wire was after passing the sidewalk in front of Kassler's store, and not till he had passed under the wire. I don't say this is positively the fact. I think the horse going across F, on Blake, was going a little sideways and prancing. Don't think the horse was all the time on a trot crossing the street. Think, perhaps, he was some of the time. He seemed to be very much excited, and was working himself up and down. There was some excitement in the crowd; and I was somewhat excited and fearful of danger on general principles—horse acting in that way in our public streets.

Plaintiff's counsel here asked the witness this question: Were you not fearful of danger because of the wire?

59 (To which defendant objected, on the ground that it was not proper cross-examination. The court overruled the said objection, and to which ruling the said defendant then and there except*ion*.)

And the witness answered: I was.

On re-examination the witness testified as follows: I was fearful of danger also from the people standing around there, and on account of the horse being unmanageable.

Defendant's counsel here asked the witness this question: How positive are you in regard to the conduct of this horse when you first saw him, and before his coming in contact with the wire?

(To which plaintiff's counsel objected, because the question was not proper re-examination; which objection the court sustained, and the defendant, by its attorney, then and there excepted to said ruling of the court.)

Witness further testified: Can't say whether I was at home about 10th of July. I went to the mountains about that time, but I don't remember positively the date.

Here admitted by plff. that witness was at Boulder Co. on that day.

Defendants asked witness this question: Were you not apprehensive of danger before you saw the wire there?

Witness answered: I was apprehensive of danger when I first saw horse, and more so when I saw him passing towards the wire.

B. F. BUSCH sworn and examined on behalf of defendant, and testified as follows:

About 18th of April, 1870, was residing in Denver; saw the accident—some part of it. Was standing on the corner of F and Blake street—corner of First National Bank. Attention was first called by some one calling, saying, look out, Charley. I turned around, and Eyser was
60 near the center of F and Blake streets. A moment afterwards he struck the wire. He seemed to become entangled in the wire. My impression was he got over it; not positive. The horse seemed to become unmanageable, and jumping around the corner of Kassler's fell over the wire. Whether he got clear over it I don't know. I thought he did. When I first saw him he was in a lope, going about five miles an hour, I should judge. Didn't observe the conduct of the horse and rider on that occasion till he struck the wire. I saw the wire. There was one man going up the pole on the corner near Kassler's with the wire. The other end of it was low down. Don't know how high wire was at Kassler's corner. Might have been five or six feet high at corner—about two feet high when he came in contact with it, should judge. The wire wasn't very tight. It loosened up when horse struck it—slackened up. Don't remember whether there was a sign-post at Kassler's corner or not. Don't think horse could have got into the wire and taken the course he did without getting over it; but I don't know; the wire slackened up.

Cross-examined by plaintiff:

On cross-examination witness testified as follows: The horse didn't pass under the wire. He passed, going west, about the center of Blake street; first struck the wire about center of street. The post the man was on was this side of alley, and in front of McCool and Johnson's store, on this side of Blake street; don't know the distance from Blake street; about 125 feet, I think; don't think it was over 100 feet; might have been fifty feet either way.

On re-examination by defendant witness testified as follows: There were wires on top of pole across street that horse would have gone under, certainly.

GEO. J. WASHBURN sworn, and testified as follows:

61 In April, 1870, I resided in Denver. Was present at the time of the occurrence. I saw the wire at or about the time the accident occurred. The wire was stretched from opposite the old office in national-bank building on F street, on the west side of F street, to the top of a pole which stood about 125 feet this side of the corner on this side of Blake street. At time of the accident I stood at the foot of the last pole, 125 feet from corner, and the wire was at the top. This wire had been elevated from the ground before the accident about as long as it would take a man to climb a 16-feet ladder and about eight feet of pole with climbers, not to exceed two or three minutes, I think. The man had climbed pole nearly to the top. I am acquainted with stretching and elevating wires of this kind; made it a business 5 years. I was putting this up. The wire was elevated in this way: 1st, wire

was run off of a reel down F street to opposite the old office, and then, after it was stretched some with pulleys, it was fastened to a pole about a foot from the ground. Then we carried the wire up on the pole. In this case the wire wasn't quite tight enough, and I had the men put pulleys on it, lighting it up some after it was up; then elevated from the ground; had the men hold it. I don't think there was much delay in getting up then except getting it over some obstructions there, signs, &c. Think the whole time in getting it up wouldn't exceed two or three minutes. The same care and diligence was used as we always used.

(Plaintiff's counsel objected to the last answer, and moved the court to strike it out on the ground that it was an attempt to show custom; which objection the court overruled, and plaintiff then and there took an exception to the ruling.)

The witness further testified as follows: I instructed the men I had (there were three men stationed there at the corner) to keep people off the wire. Have had conversations with the plaintiff about the transaction. Was taking down the wire on F between Blake and Hol-
62 liday. The wire was laying on the ground. Plaintiff came up and said he'd have to look out for the wire. This was 4 or 5 months after the accident. Took glasses out of his pocket and said if he had had these on he wouldn't have run in the wire; that he was near-sighted, or something to that effect; that he didn't blame the company; that he blamed the city for not having officers there to keep people off the wire. The men I stationed at that place were William Warren; haven't the names of the other two; don't remember them.

Cross-ex.:

On cross-examination the witness testified as follows: I was putting up the wire; had charge of it.

Plff.'s counsel here asked the witness the following question: "You don't mean you were putting it up for your own purposes?"

(To which the defendant's counsel objected because it was an attempt to re-open plaintiff's case; which objection was overruled by the court, and an exception then and there taken by defendant to the said ruling of the court.)

The witness answered: I was putting it up on account of somebody else.

Witness then testified: The three men I refer to I stationed at the corner of Blake and F streets. Don't know what they were doing nor where they were at the time this accident occurred. I don't know whether any warning was given or attempted to be given to plaintiff at the time of this occurrence. The wire was stretched only 2 or 3 minutes.

Question. Was it or not elevated and lowered several times during the process of erection?

(Which question was objected to by defendant because immaterial; which objection the court overruled, and defendant then and there excepted to the ruling.)

The witness answered: I think it was.

Witness then further testified as follows: There was a pole between which that man was climbing and the one to which the wire was fast-
ened. The wire was not elevated on that pole at the time. From
63 the pole the man was climbing to where wire was fastened is over 200 feet. The pole the man was climbing was in front of the shoe-store. The next below was at Brendlinger's corner, and the next one below was about 40 feet below the corner.

Plaintiff's counsel here asked the witness this question: At the time of the accident, were not two men or more at the foot of the pole opposite the old office, tightening the wire?

(To which question defendant's counsel objected on the ground that it was not proper cross-examination; which objection the court overruled, and defendant then and there took an exception to said ruling of the court.)

The witness answered as follows: I know there was one man there; couldn't say there was more. The insulators were fixed upon those posts. The wire wasn't fastened at the top of the pole at the time of the accident. The man up there was holding it with his hands. It came near throwing him off. He had to drop it to save himself.

Question. Assuming the posts to have been up already, and the insulators and brackets up, how long would it have taken, at the top of posts, to string and fasten the wire?

Answer. With the four men I had, probably 5 or 10 minutes. I think likely I stated on the former examination that Eyser said that if he had had his glasses on, he could have seen the wire.

Re-examined by defts.:

Question. Did you have as many men there as you could have worked conveniently in the erection of this wire?

Answer. I had as many men as I could use at that time.

ARTHUR W. BRINKER sworn on behalf of defendant, and testified as follows:

In April, 1870, I resided in Denver; on corner of Blake and F was where I did business. I didn't see the injury to plaintiff that occurred at that time. I saw plaintiff on that occasion. This was before
64 the accident. When I first saw him he was in the middle of Blake street, about 20 feet from the northern gutter of F, at crossing of Blake; about the crossing of Blake street with northeast gutter of F. He was riding horseback; loping along, between a trot and a lope; not fast; a little over a moderate gait. I halloed myself for him to stop; don't remember that I heard any others. Plaintiff went on. When I called to him he was about the middle of F street, on the old cistern there. I halloed to him to stop. I was standing on the sidewalk when I called to him. I halloed loud enough to be heard.

Cross-examined:

On cross-examination witness Brinker testified as follows: I don't know whether Eyser knew that my call was addressed to him. It was but a moment, you might say, from the time I called till he struck the wire. Eyser at that time was going towards Cherry Creek bridge. It wasn't anything in the manner in which Eyser was riding that caused me to give this warning. It was seeing the wire stretched across the street. There was nothing unusual in the conduct of Eyser or his horse that I noticed.

Re-examined by deft.:

I halloed because the wire was stretched and approaching danger. He was riding towards it and I wanted to stop him.

B. F. WOODWARD examined on behalf of defendant.

I was near where the accident occurred in April, 1870. I was standing on F street, near to, opposite Haywood & Co. store, looking at man going up pole with the wire, with face in that direction. I heard the

sound of something striking the wire, and a violent jerking of the wire, and turned and looked down Blake street. At first there was no one in sight, nothing to account for the jerking, but almost instantly plaintiff came back, as it seemed to me coming this way, and the horse attempted to jump over it, and was caught in the wire and plunged
65 and fell. I was looking towards Blake street. The horse and rider were coming eastward, and I saw them as they came out from the front of Fillmore block, on corner of Blake and F streets. At first there was nothing in sight, but in a moment the horse came in sight, and then it was only the width of the sidewalk; two jumps would bring him to the wire. The wire was stretched along the outer edge of sidewalk, outside of the poles. When I first saw Eyser he was west side of of wire coming eastward, and the width of the sidewalk off the wire 10 or 12 feet, I should judge. The wire had been run off from wire wagon (I had been with them most of the time) from Larimer street to a pole about 60 feet from Brendlinger's corner. The wire was attached there. It was drawn up, and the kinks taken out by means of pulleys. Wire won't stretch. Couldn't say positively whether Eyser's horse was tangled in wire when I first saw him. Don't think he could have been, under the circumstances. Have no idea he was. The wire was being carried up on a pole. This was to attach to an insulator. I heard a violent concussion, and noticed a jerking of the wire, and when I turned and looked in that direction I could see no cause for it at first; immediately after I saw Eyser. On that corner there was a sign-post; quite a crowd of lookers-on watching the work. I am somewhat acquainted with the business of putting up wires. Have had more or less experience in the business for several years. Think it is not possible for Eyser's horse to have been entangled in the wire, and carry it around the post to where he plunged and fell. I didn't examine wire after the accident occurred. Can't state whether it was broke or not. I rushed down to the place, and found man lying on the ground, and rushed off for a doctor as an act of humanity.

Cross-examined:

On cross-examination by plaintiff, the witness Woodward testified as follows: The wire was on outside next to the street of post at the Kassler corner; when horse came back he struck the wire. It seemed
66 to me that when the horse struck the wire it was almost under his breast. He seemed to rear and try to jump over it, and, instead of clearing it, carried it with him and fell. He fell on his knees and on his side a little and jumped up and ran off. Think I saw the wire as it was in front of the horse from where I stood. Think the wire was sufficiently tight to throw the horse 4 or 5 feet from the sidewalk without his being entangled in the part you claimed was carried around the post at the corner. When I observed the first concussion, I was standing a little outside of the gutter. I was instantly impressed with the idea a wagon had run into the wire. The wire wasn't much jerked in hands of the man on the pole. I think he let go and threw his arms around the pole. Think the wire didn't fall down to the ground; didn't see the wire afterwards.

On re-examination of witness Woodward, defendant's counsel asked the witness the following question: Give your reasons, if you have any why the wire was not carried around the pole.

(To which question plaintiff's counsel objected, on the ground that it was not proper re-examination, and because it was not proper for the

witness to give his opinion; which objection was sustained by the court, and the said defendant, by its attorney, then and there excepted to the ruling of the court.)

Which being all the evidence offered by either of said parties—

The defendant then moved the court, upon the evidence aforesaid, to instruct the jury as follows, viz:

1st. That the burden of proof in this action is upon the plaintiff to show, not only that the defendant was guilty of negligence, but that he himself was not guilty of negligence or carelessness, before he is entitled to recover.

2d. That if the jury believe, from the evidence, that the injury to the plaintiff in this case was the result of the fault or negligence of
67 the plaintiff, or the fault or negligence of both the plaintiff and defendant, without any intention on the part of the defendant, then the plaintiff cannot recover, and the jury must find for the defendant.

3d. That the defendant in this case, being a corporation, is only held liable for ordinary care and diligence for the acts of its servants or agents, and if the jury believe, from the evidence in this case, that ordinary care and diligence was used in putting up the wire at the time and place when the accident occurred, then the jury should find for the defendant.

4th. If the jury believe, from the evidence, that the plaintiff in this case contributed to the bringing about the accident in this cause, by his own negligence or want of care, then they must find for the defendant, even though they should believe, from the evidence, that the defendant had been also guilty of negligence or want of ordinary care.

5th. That before the defendants can be held liable for the injury complained of in this case, it was incumbent on the plaintiff to prove that the persons engaged in stretching the wire across Blake street were the servants or agents of the defendant, and as such servants or agents they were acting within the scope of their authority at the time of the accident, and if this fact has not been satisfactor'y shown to the jury, they should find for the defendant.

6th. That the fact that Mr. Woodward was superintendent of the defendant, in charge of the defendant's line of telegraph south of Cheyenne and the defendant's office at Denver, is not sufficient to show an authority from the defendant to construct and stretch a wire across Blake street at the time of this accident; and that in this case, to fix the liability of the defendant in this case, it should have further appeared in evidence that Mr. Woodward was acting within the scope of his authority in the construction of this work; and further, that
68 the jury cannot infer an authority from this defendant to Woodward to order the stretching this wire across Blake street, from the fact that he was the general superintendent of the defendant, in charge of its line south of Cheyenne and its office in Denver.

7th. That the fact of the wire being stretched across Blake street at the time the accident occurred, and by the parties engaged in the work at the time, is not sufficient to show a liability on the part of the defendant, unless it be shown that they were employed by the defendant and were acting within the scope of their authority, and that the defendant did not exercise ordinary care and diligence, and that the plaintiff did not himself contribute to the accident.

8th. If the jury believe from the evidence that the plaintiff received warning, no matter from what source, in time, so that a prudent man in the exercise of ordinary care and diligence could have averted the

accident, and failed to do so, then he himself is at fault, and the jury should find for the defendant.

9th. That before the plaintiff can recover in this action he must show that he was exercising ordinary care and diligence himself to avoid accidents; and if the jury believe from the evidence that such ordinary care and diligence was not used by him, or that he was riding at such a gait and in such a manner as to render it impossible to avoid danger, when warned of it in time, or that his horse was unmanageable by reason of such gait and manner of riding, or for any other cause, then the jury should find for the defendant.

10th. That if the jury believe from the evidence that the plaintiff received warning of the danger in time to avert it had he been riding at a moderate speed, but that he could not avert it by reason of the immoderate speed at which he was riding, then he was at fault, and the jury should find for the defendant.

69 11th. That if the jury believe from the evidence that the accident was brought about by reason of the unmanageable character of the horse which the plaintiff was at the time riding, they should find for the defendant.

12th. That under the pleadings in this case it is necessary for the plaintiff to prove that the defendant is a corporation; and if the plaintiff has failed to prove this fact, they will find for the defendant.

13th. That if they find from the evidence that at the time the accident occurred the persons engaged in erecting the telegraph-wire were the employees or agents of the defendants, but were acting without the scope of their authority, no subsequent ratification of the act of erecting the said telegraph-wire by the defendants, or operating the same, can be held to include a ratification of their negligent or wrongful acts while erecting said wire, and the jury should find for the defendant.

14th. The jury are instructed that a tort cannot be ratified, and certainly not unless it be shown conclusively that the party ratifying had full knowledge of the wrongful acts he was ratifying.

15th. That when the agency is to be proved by the subsequent ratification of the acts by the principal, there must be evidence of previous knowledge on the part of the principal of all the material facts; and if the jury find from the evidence that the agents or employees of the defendant were erecting this wire at the time the accident occurred, but were acting without the scope of their authority, then it devolves upon the plaintiff to show conclusively that the defendant had full knowledge of the negligence or wrongful acts of such agents before the defendant can be held liable; and if there be insufficient evidence to establish the fact that the defendant had this knowledge before ratifying the acts of such agents engaged in erecting said wire, the jury must find for the defendant.

70 16th. That to entitle the plaintiff to recover in this action, it was necessary for him to show not only that the persons engaged in erecting this telegraph-wire at the time the accident occurred were the agents or employees of the defendant, but that they were acting within the scope of their authority, or, if acting without the scope of their authority, that the defendant subsequently ratified their acts with full knowledge of their negligence while so engaged, and as these facts are not legally shown by the evidence, the jury are instructed to find for the defendant.

17th. That an agency is a question of law as well as of fact, and that the sufficiency of evidence necessary to establish an agency so as to incur a liability on the part of the principal is for the court to determine,

and not within the province of the jury; and the evidence in this case on that point being insufficient to support a verdict and the agency necessary to be proved before the plaintiff could recover not being proved, the jury are instructed to find for the defendant.

18th. That in the absence of any proof to the contrary, the presumption of law is that the defendant had the requisite authority to erect a telegraph-wire across Blake street—if it did erect such wire—and unless the plaintiff has by evidence shown to the contrary, the jury will presume that defendant had the requisite authority to erect such telegraph-wire.

Which said instructions the court refused to give the jury.

To which the defendant then and there excepted; and the court thereupon instructed the jury as follows:

In order to entitle the plaintiff to a verdict in this cause, it is incumbent upon him to establish—

I. That the injuries complained of by him resulted directly from the negligence of the servants or agents of the defendant while engaged in doing what was within the scope of their authority and agency to do.

II. That the culpable negligence of the plaintiff did not contribute to occasion such injury: that is to say, that the plaintiff himself did
71 not on the occasion complained of omit to exercise such effort an' caution to avoid the accident and injury as a man of ordinary prudence and circumspection placed in the same circumstances would have exercised.

II. Before the jury can find that the person who erected the wires were the agents of the defendant and acting within the scope of their authority, the jury must be satisfied by the evidence that the said persons had been before the time thereof directed or employed to erect said wires by the agents or officers of the defendant, or some of them having authority to direct the construction of lines of wire within the district containing the city of Denver.

If the jury believe from the evidence that the persons who erected the wires had not such original authority, then there being no evidence in the case which will warrant the inference of a subsequent ratification by defendant, the jury must find for the defendant.

III. If the jury believe that those who erected the wires had authority from defendant in the first instance, and that said wires were erected in a negligent manner and that the injuries complained of by plaintiff resulted in any degree from this negligence, then the jury will also consider whether the plaintiff was guilty of culpable negligence which contributed to produce such injuries.

IV. And if the injury complained of resulted without negligence of the defendant, or from the negligence of the defendant and the culpable negligence of the plaintiff, as above defined combined, the plaintiff cannot recover.

V. If, before the alleged accident, the plaintiff was called to or warned by persons standing near the vicinity, whether employees of the defendant or not, and *and* the call or warning was so definite as to apprise him of the existence and locality of the obstructions alleged to have occasioned the injury, and came in such time that the plaintiff, by the exercise of such care and effort as a man of ordinary prudence in the same
72 circumstances would have exercised, might have escaped the injury complained of; and if, notwithstanding such warning, the plaintiff continued his progress, then the plaintiff was guilty of culpable negligence.

VI. In determining whether plaintiff was or was not guilty of culpable

negligence, the jury may consider the rate or gait at which plaintiff was riding and the time and place at which the accident is alleged to have occurred; and whether, with reference to that time and place, the rate at which plaintiff was riding was or was not immoderate or unreasonable.

If plaintiff was riding at a rate which a man of ordinary prudence would not have ridden at that place and time; and if riding at no faster rate than a man of ordinary prudence at that time and place would have ridden, plaintiff might have escaped the injury complained of, the plaintiff was guilty of culpable negligence.

VII. But if the plaintiff was riding at a rate not faster than a man of ordinary prudence and circumspection would have ridden at that time and place, and, notwithstanding the warning alleged to have been given, could not have checked his speed by the exercise of such exertion as a man of ordinary prudence would have exercised upon the same warning and in the same circumstances, then the plaintiff was not guilty of culpable negligence in omitting to heed such warning.

VIII. In determining whether plaintiff was or was not guilty of culpable negligence contributing to the injury complained of, the jury may also consider whether the horse ridden by plaintiff was well broken and manageable or otherwise.

IX. If the plaintiff was riding an unbroken or unmanageable horse, in a crowded thoroughfare, and the accident to plaintiff resulted from the inability of plaintiff to check his speed by reason of such unmanageability, and if the plaintiff, after the alleged warning given, might,
73 by the exercise of such effort as a man of ordinary prudence would have exerted under like circumstances, have checked his speed, had the horse been a well-broken and manageable horse, then the plaintiff cannot recover.

X. If the defendant's agents and servants, acting within the scope of their authority from defendant, were engaged in constructing a telegraph line in the city of Denver, and in such construction stretched a wire across one of the public and frequented streets of said city during the hours of the day when such streets are wont to be frequented, and suffered such wire to remain stretched across said street and elevated such distance above the ground as to obstruct or entangle the feet of a horse passing upon said street for the space of one half minute to a longer period, and if, unless such wire was of such size and character as to be easily seen by persons approaching at a moderate speed, defendant's agents omitted to station flag-sentinels or other sufficient means of warning to warn or notify passers-by of the place where such wire was stretched, or if defendant's agents did station such sentinels and they failed to give warning to plaintiff, then the defendant was guilty of negligence, and if from such negligence the injury complained of occurred, without culpable negligence on the part of plaintiff contributing thereto, then the jury ought to find for the plaintiff, and in fixing the plaintiff's damages should compensate the plaintiff not alone for his actual loss in the loss of time during his confinement or disability, if any, resulting from the alleged accident, but may award exemplary damages proportioned to the nature and extent or character of the injury and all circumstances of aggravation or extenuation attending the alleged negligence of defendant, and the extent of such damages is to be measured by the sound discretion of the jury in view of all the circumstances, but such damages are not to exceed the damages laid in the declaration, ($10,000,) ten thousand dollars.

XI. The jury will not allow, in estimating the actual damages sus-

tained by plaintiff, the expenses incurred, of which plaintiff has
74 become liable for the medical attendance of the witness McClellan.

XII. The jury will consider the ordinances of the city of Denver, read before them, only for the purpose of ascertaining whether the streets called Blake and F streets were or were not, at the time of the alleged accident, public highways.

XIII. The form of the verdict in this case is: We find the defendant [guilty or not guilty.]

And if the jury find the defendant guilty they will assess the damages.

To the giving of which instructions to the jury the said defendant, by its attorneys, then and there excepted.

Whereupon the jury retired to consider of their verdict, and afterwards returned into court and rendered the following verdict:

CHARLES EYSER
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

We, the undersigned jurors, empannelled in the above-named case, find the defendant guilty, and assess the plaintiff's damages at five thousand five hundred dollars. ($5,500.)

	H. H. Jacobs.	P. Shoaf.
	Austin Cunningham.	I. S. Culvert.
	James M. Riland.	M. J. Dugan.
	George Schram.	Thomas H. Brainard.
75	F. M. Danielson.	J. P. Ringwalt.
	A. B. Ingolls.	James S. Taylor, *Foreman.*

Whereupon the defendant, by its attorneys, filed the following motion for a new trial:

In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid, of the January term, A. D. 1872.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

THE WESTERN UNION TELEGRAPH COMPANY
ats.
CHARLES EYSER. } Trespass on the case.

And now on this day comes the said defendant, by Charles & Elbert, its attorneys, and moves the court for a new trial in the above-entitled cause, for the following reasons, to wit:

1st. Because the verdict of the jury is contrary to the law and the evidence.

2nd. Because the verdict of the jury is manifestly against the weight of the evidence and unsupported by the evidence.

3d. Because the verdict of the jury is against the instructions of the court.

4th. Because the jury, in making up their verdict, disregarded the instructions of the court and the law of the case.

5th. Because the court admitted improper testimony to go to the jury for the plaintiff in said cause.

6th. Because the court refused to permit proper evidence to be
76 given to the jury for the defendant in said cause.

7th. Because the court gave improper instructions to the jury in said cause and instructed the jury erroneously as to the law of the case.

8th. Because the court refused to give to the jury the instructions asked for by the defendant in said cause, and gave others in the place thereof, which did not fairly present to the jury the law of the case.

9th. Because the court instructed the jury erroneously as to the law of the case for the plaintiff.

10th. Because the damages assessed by the jury are excessive.

11th. Because the court instructed the jury erroneously that they might give exemplary damages in this case.

12th. Because the verdict of the jury is informal and improper.

13th. Because of other good and sufficient reasons apparent in the record and proceedings in said cause.

CHARLES & ELBERT,
Attorneys for Defendant.

But the court overruled the said motion, and gave judgment upon the said verdict of the said jury, against the defendant, to which the defendant then and there excepted, and inasmuch as the matters aforesaid do not appear of record, the counsel for the defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the court and made a part of the record in said cause; and it is done accordingly.

EBENEZER T. WELLS, [SEAL.]
Associate Justice Sup. Court & Judge First District Colorado.

77 This bill tendered to me this 22nd day of March, 1872.

E. T. WELLS, *Judge.*

(Endorsed:) Charles Eyser vs. The W. U. Teleg. Co., bill of exceptions. Filed January 24, 1872. G. H. Mills, clerk.

And afterwards, to wit, on the 14th day of February, A. D. 1872, came the said defendant by its attorneys and filed in said court its appeal-bond in said cause, together with the power of attorney authorizing the execution of such bond. And the said bond is in the following words, to wit:

Know all men by these presents that we, the Western Union Telegraph Company, a corporation, as principal, and B. F. Woodward and Wm. N. Byers as sureties, are held and firmly bound unto Charles Eyser in the penal sum of eight thousand dollars, good and lawful money of the United States, for the payment of which sum we bind ourselves, and the heirs, executors, and administrators of the sureties as aforesaid, jointly and severally, firmly by these presents.

In witness whereof, the said Western Union Telegraph Company, by B. F. Woodward, its attorney in fact, has hereunto set its name and a seal, which, for the purposes of this obligation, shall be deemed and taken to be the seal of said company; and the said sureties have hereunto set their hands and seals this 13th day of February, A. D. 1872.

The condition of this obligation is such that whereas the said Charles Eyser did, on the twenty-fourth day of January, A. D. 1872, in the district court of the first judicial district of Colorado Territory, sitting within and for the county of Arapahoe, at the January term thereof, recover a judgment against the above-bound Western Union Telegraph Company, for the sum of five thousand five hundred dollars, damages,

together with costs of suit in a certain action of trespass then pending in said court, wherein Charles Eyser was plaintiff and the said
78 Western Union Telegraph Company was defendant, from which judgment the said Western Union Telegraph Company has taken an appeal to the supreme court of Colorado Territory:

Now, therefore, if the said Western Union Telegraph Company shall duly prosecute said appeal, and shall pay such judgment, costs, interest, and damages in case said judgment shall be affirmed, then this obligation to be null and void, otherwise to remain in full force and effect.

THE WESTERN UNION TELEGRAPH COMPANY, [SEAL.]
By B. F. WOODWARD, *its atty. in fact.*
B. F. WOODWARD. [SEAL.]
WM. N. BYERS. [SEAL.]

(Endorsed:) 1885. Charles Eyser vs. The W. U. Teleg. Co. Appeal-bond. Approved by me and filed in the district court, February 14th, A. D. 1872. Geo. H. Mills, clerk.

And the said power of attorney filed with said bond is in the following words, &c., to wit:

[50 cents revenue stamp canceled.]

Know all men by these presents that the Western Union Telegraph Company, a corporation organized under the laws of the State of New York, has made, constituted, and appointed, and by these presents does make, constitute, and appoint Benjamin F. Woodward, of Denver, in the Territory of Colorado, its true and lawful attorney, for it and in its name, place, and stead, to execute and file a bond to take the case of Charles Eyser versus Western Union Telegraph Company, by appeal or otherwise, to the supreme court of Colorado Territory from the district court of the first judicial district of Colorado Territory within and for the county of Arapahoe, in the sum of eight thousand dollars, giving and granting unto its said attorney full power to execute any and all papers or bonds, and to do any acts which may be requisite or necessary under the laws or rules of court of said Territory to perfect an appeal
79 in the said case of Charles Eyser against said telegraph company, and to do everything whatsoever requisite and necessary to be done in the premises as fully as it could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that its said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, the said Western Union Telegraph Company has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary, this thirtieth day of January, one thousand eight hundred and seventy-two.

THE WESTERN UNION TELEGRAPH COMPANY,
By WILL'M ORTON, *President.*

{ WESTERN UNION [Seal.] TELEGRAPH CO. }
GEO. H. MUMFORD, *Secy.*

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the supreme court, a court of record of said State of New York, in and for the city and county of New

83 In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid, January term, A. D. 1872.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

WESTERN UNION TELEGRAPH COMPANY, APPELLANT,
vs.
CHARLES EYSER, APPELLEE.

The clerk of said court will please prepare a certified transcript of the record in the above-entitled cause, appealed by the defendant in said cause at the term above stated. Let said record contain the following:

1st. A copy of the process issued in said cause, & sheriff's return on the same.

2d. A copy of the declaration filed by plaintiff in said cause.

3d. A copy of the pleas filed by defendant in said cause.

4th. A copy of plaintiff's demurrer to defendant's 2d, 3d, & 4th pleas, and the order of the court sustaining said demurrer.

5th. The orders of court of the last trial of said cause at the January term of court, A. D. 1872, empannelling jury, the rendition of the verdict, and the verdict overruling motion for new trial, judgment on the verdict, allowing appeal and time to file bond, bill of exceptions, &c.

6th. A copy of the bill of exceptions filed in said cause.

7th. Copy of appeal-bond, & power of attorney executing same, &c.

CHARLES & ELBERT,
Attys. for Appellant.

To GEO. H. MILLS, Esq.,
Clerk Dis. Ct.

84 In the supreme court of the Territory of Colorado, of the February term thereof, A. D. 1873.

THE WESTERN UNION TELEGRAPH COMPANY, appellant,
vs.
CHARLES EYSER, APPELLEE.
} Assignment of errors.

And now comes the Western Union Telegraph Company, appellant, by Charles & Elbert, its attorneys, that in the record and proceedings aforesaid, & in the rendition of judgment aforesaid, there is manifest error, this, to wit:

First. That the court erred in sustaining the demurrer of the said plaintiff to the second, third, and fourth pleas of the defendant, filed in said cause.

Second. That the verdict of the jury in this cause was manifestly against the evidence, and cannot be supported by it.

Third. That the court erred in permitting improper evidence to go to the jury on the trial of said cause.

Fourth. That the court erred in refusing to permit proper evidence to go to the jury, offered by the defendant on the trial of said cause.

Fifth. That the court erred in overruling the defendant's motion for a new trial for the reasons therein set forth.

Sixth. That the court erred in refusing to instruct the jury as asked by the defendant on the trial of said cause, and particularly in refusing

to give to the jury the instructions prayed for by the defendant and numbered one, two, three, four, five, six, eight, nine, and twelve.

Seven. That the court erred in the instructions given to the jury in this, that the jury were not particularly directed to the evidence as the only source of information from which they were to find the facts on which to base their verdict, but *even* left to conjecture.

Eighth. That the court erred in charging the jury as follows: "That the culpable negligence of the plaintiff did not contribute to
85 occasion such injury, that is to say, that the plaintiff himself did not, on the occasion complained of, omit to exercise such effort and caution to avoid the accident and injury, as a man of ordinary prudence and circumspection, placed in the same circumstances, would have exercised."

Ninth. The court erred in charging the jury as follows: "If the jury believe that those who erected the wires had authority from the defendant in the first instance, and that said wires were erected in a negligent manner, and that the injury complained of by plaintiff resulted in any degree from this negligence, then the jury will also consider whether the plaintiff was guilty of culpable negligence which contributed to produce such injuries; and if the injury complained of resulted without negligence of the defendant, or from the negligence of the defendant and the culpable negligence of the plaintiff, as above defined, combined, the plaintiff cannot recover."

Tenth. That the court erred in charging the jury as follows, to wit: "But if the plaintiff was riding at a rate not faster than a man of ordinary prudence and circumspection would have ridden at that time and place, and, notwithstanding the warning alleged to have been given, could not have checked his speed by the exercise of such exertion as a man of ordinary prudence would have exercised upon the same warning and in the same circumstances, then the plaintiff was not guilty of culpable negligence in omitting to heed such warning."

Eleven. That the court erred in charging the jury as follows, to wit: "If the defendant's agents or servants, acting within the scope of their authority from defendant, were engaged constructing a telegraph-line in the city of Denver, and in such construction stretched a wire across one of the public and frequented streets of said city during the hours of the day when such streets are wont to be so frequented, and suffered such wire to remain stretched across said street and elevated such distance above the ground as to obstruct or entangle the feet of a horse passing upon said street, for the space of one-half minute to a longer period; and if, unless such wire was of such size and character as to be
86 easily seen by persons approaching at a moderate speed, defendant's agents omitted to station flags, sentinels, or other sufficient means of warning, to warn or notify passers-by of the place where such wires were stretched; or if defendant's agents did station such sentinels, and they failed to give warning to plaintiff, then the defendant was guilty of negligence; and if from such negligence the injury complained of occurred, without culpable negligence on the part of plaintiff contributing thereto, then the jury ought to find for the plaintiff; and in fixing the plaintiff's damages should compensate the plaintiff, not alone for his actual loss of time during his confinement or disability, if any result*ing* from the alleged accident, but may award exemplary damages proportioned to the nature and extent or character of the injury; and all circumstances of aggravation or extenuation attending the alleged negligence of the defendant, and the extent of the damages, is to be measured by the sound discretion of the jury in view of all the circumstances, but

such damages are not to exceed the damages laid in the declaration, ($10,000,) ten thousand dollars."

Twelfth. And for other manifest error appearing upon the face of the record.

CHARLES & ELBERT,
Counsel for Appellant.

(Indorsed:) Charles Eyser vs. Western Union Telegraph Co. Præcipe for record, &c. Filed October 1st, A. D. 1872. G. H. Mills, clerk.

(Indorsed:) 92 Sup. Court, Western Union Telegraph Co., appellant, vs. Charles Eyser, appellee. Record. Filed Feby. 13, 1873. David Crater, clerk.

87

88 And afterwards, to wit, on the 15th day of February, A. D. 1873, there was filed in the office of the clerk of the supreme court of Colorado Territory, a joinder in error in said cause, in words and figures following, to wit:

In supreme court, February term, A. D. 1873.

TERRITORY OF COLORADO, *ss:*

THE WESTERN UNION TELEGRAPH COMPANY, appellant, *vs.* CHARLES EYSER, APPELLEE. } Joinder in error.

And the said Charles Eyser, appellee, by Browne & Putnam, his attorneys, and says that there is no error either in the record and proceedings aforesaid, or in giving judement aforesaid, in manner and form as above assigned, and therefore he prays that the said judgment may be affirmed and that his costs may be adjudged to him, &c.

By BROWNE & PUTNAM,
Attys. for Appellee.

(Endorsed:) 92. Western U. Tel. Co., appellant, vs. Chas. Eyser, appellee. Joinder in error. Filed February 15, 1873. David H. Crater, clerk. B. & Put.

89 And afterwards, to wit, on the 28th day of February, A. D. 1873, the same being one of the regular days of said February term, A. D. 1873, of said court, the following proceedings were had and entered of record in said court in said cause, to wit:

WESTERN UNION TELEGRAPH COMPANY, appellants, *vs.* CHARLES EYSER, APPELLEE. } No. 92.—Appeal from district court, Arapahoe County.

At this day comes the said parties by their attorneys, Charles & Elbert for said appellant, and Browne & Putnam for said appellee, and by agreement of the parties this cause is submitted to the consideration and judgment of the court upon written briefs and arguments, filed herein, and judgment thereon is reserved until another day.

And afterwards, to wit, on the 6th day of September, the same being one of the regular days of said February term, A. D. 1873, of said court, the following proceedings were had and entered of record in said court in said cause, to wit:

90 WESTERN UNION TELEGRAPH COMPANY, appellant,
vs.
CHARLES EYSER, APPELLEE.
} No. 92.—Appeal from district court, Arapahoe County.

At this day comes the said parties, by their attorneys, and this cause having been argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error either in the record and proceedings nor in the judgment of the said district court in this cause, it is therefore ordered by the court that the judgment of the said district court of Arapahoe County, in this cause, be, and the same is hereby, affirmed, and stand in full force and effect; that the opinions of the court filed herein be recorded, and that the said appellee recover, of and from the said appellant, his costs and charges in this behalf expended, and that he have execution therefor.

And on the same day, to wit, the day last aforesaid, there was filed in the office of the clerk of said supreme court opinions of said court by Justices Belford and Wells, in words and figures following, to wit:

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92 In the supreme court of Colorado Territory.

THE WESTERN UNION TELEGRAPH CO.
vs.
CHARLES EYSER, APPELLEE.
} Appeal from the Arapahoe district court.

This was an action on the case instituted by the appellee against the appellant to recover damages for injuries sustained by the appellee by reason of the negligence of the appellant in the construction, erection, and establishment of a line of telegraph through and over a portion of the city of Denver and across Blake street.

The defendant filed four pleas:

1st. The general issue.

2nd. Nul tiel corporation.

3rd & 4th. Pleas set up that the injury was occasioned by the contributory negligence of the plaintiff.

A demurrer was sustained to the 2, 3, 4 pleas, and the case was tried on the general issue. A verdict for the plaintiff for $5,000. Motion for new trial overruled. Judgment on the verdict, & appeal.

Opinion of BELFORD, J.:

It is claimed first that the court erred in sustaining the plaintiff's demurrer to the defendant's second, third, and fourth pleas.

It is no objection to a plea which is well pleaded in other respects, that the matter of it may be given in evidence under the general issue. The right to plead as many pleas as a defendant may deem necessary for his defense is secured by statute. In so pleading, however,

93 it is not his privilege to encumber the record with tautologies, allegations, nor with pleas which, while they pretend to be special,

amount only to a denial of the plaintiff's allegation. When a plea amounts simply to the general issue, and when the matters set up in it may be given in evidence under the general issue, the usual course is to strike such plea from the files on motion. It has been held, however, by some respectable courts that a general demurrer will also be sustained. (Curtis vs. Central R. R. Co., 6 McLean, 401.) Any matter of defense which denies what the plaintiff, on the general issue, would be bound to prove, may and ought to be given in evidence under the general issue, and a plea setting up negatively such facts is bad. (Bank of Auburn vs. Weed, 19 Johnson, 302.) But any grounds of defense which admits the facts alleged in the declaration, but avoids the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue, may be pleaded specially. Evidence that the plaintiff's negligence contributed to the injury sued for may be given in evidence under the general issue. (Indianapolis R. R. Co. vs. Rutherford, 29th Ind., 82; Bridge vs. Grand Junction R. R. Co., 3 M. & W., 244.) If the negligence of the plaintiff did contribute to the injury, that was a fact to be proved by the defendant. (Railroad vs. Gladman, 15 Wall., 401.) I therefore see no objection to the ruling of the court on the demurrer, as to 3 & 4th pleas. The 2nd plea, that of nul tiel corporation, seems to have been regarded by the court as a plea of abatement, and by the plaintiff's counsel as objectionable, not only on that ground, but on the further ground that the general issue filed in the case admitted that the defendant was a corporation, and the two pleas, being inconsistent, could not stand together. I think that both court & counsel were mistaken in the estimate placed on this plea. It seems to be almost uniformly held that when an action is brought by a corporation-plaintiff, and the defendant files the general issue, the capacity of the plaintiff to sue is admitted. (Phœnix Bank vs. Curtis, 14 Conn., 438, & authorities cited.) In Massachusetts and New York, 94 decisions are to be found wherein it is held that, when a corporation is defendant and files the general issue, it devolves upon the plaintiff to prove the corporate capacity of the defendant. (Stoddard vs. the Onondaigua Annual Conference, 12 Barb., 573; Gott vs. Adams Express Company, 100 Mass., 320.) It must be observed that in Massachusetts the plea of not guilty is made, by rule of court, tantamount to a distinct denial of each and every allegation contained in the plaintiff's declaration; while at common law, in cases involving injuries to the absolute rights of persons, this only puts in issue the act complained of, but in injuries to the relative rights and to personal and real property it put in issue the existence of the right as well as the commission of the act complained of. (1 Chitty Plead., 473.) If the plea of the general issue admits the legal existence and competency of a corporation to maintain an action, I cannot perceive why the same rule should not apply to corporations when sued as defendants. The only effect of the admission is that, at the time of the institution of the suit, the corporation, a party thereto, was capable of suing or being sued. That the rule is applicable in both cases is held by at least two respectable courts. (Gay vs. Kay, 30 Ill's, 422; Freeman vs. Mill Co., 38 Maine, 345; Oldtown vs. Veasie, 39 Maine, 571, also 587.)

Was the special plea filed by the defendant denying the corporate existence in abatement or bar of the action? Speaking on this subject, Sharswood, J., says:

"A plea in bar impugns the right of action altogether; a plea in abatement only the firm or names in which it is brought. (Stephen on Plead., 432.) Hence the misnomer of a corporation as well as of a natu-

ral person must be pleaded in abatement. But the defense that there never was such a natural person as the plaintiff in rerum natura, or that such a corporation as that named as plaintiff or defendant never existed, which are pleas of precisely the same nature, go to the right of action altogether, and are therefore pleadable in bar. One reason is that in the latter case the defendant cannot give the plaintiffs a better writ, which must generally be done in abatement.

"In a case reported in the year book 22, Edw. IV, it is held
95 that in action by a corporation or natural person, misnomer of the one or the other goes only to the writ; but to say there is no such person in rerum natura, or no such body-politic, this is in bar; for if he is misnamed, he can have a new writ by the right name, but if there be no such body-politic or no such person then he cannot have such action."

This decision has been recognized and followed in subsequent cases, both in England and in this country. (Mayer and Burgesses of Stafford vs. Balton, 1 Bos. & Pal., 40; Malden vs. Miller, 1 B. & Ald., 704; Bank of Metropolis vs. Orme, 3 Gill., 444; Town of Lewistown vs. Proctor, 27 Ills., 414; Hoelith vs. Franklin Mill Co., 30 Ills., 157; School District vs. Blaisdel, 5 N. H., 198; Proprietors of Sanopee vs. Eastman, 32 N. H., 473; Northumberland County Bank vs. Eyer, 60 Pa., St. Rep., 439; Gaines vs. Bank, &c., 12 Arkansas, 769.)

The plea must show when in bar that it goes to the cause of action alleged in the declaration, and not to the form or name in the writ It has been settled, therefore, from the earliest period that it is not enough in such a plea in a suit by a natural person to aver that there was no such person in rerum natura at the time of the issuing of the writ; but it must allege that there never was such a person. The same rule applies to the plea of nul tiel corporation. In Massachusetts the plea of nul tiel corporation is regarded as good, whether plead in abatement or bar of the action.

(Christian Society &c. vs. McCumber, 3 Met., 235; Townsend vs. First Freewill Baptist Church, 6 Cush., 281; Greenwood vs. Lake Shore R. R. Co., 10 Gray, 374.) And to the same effect is the case The Society &c. vs. Paulet, 4 Peters, 480. It has been suggested that it is an anomaly in the law for a corporation to interpose the plea. The right to do so is abundantly established by many respectable courts. (See athorities last above cited; also, Judah vs. Insler, 4 Ind., 336; Stone vs. Cong. Soc., Berkshire, 14 Ver., 86.)

In the plea under consideration it is averred "that the said de-
96 fendant was not at the commencement of said suit, and is not now, and was not at the time the said supposed grievances in the declaration mentioned were committed, a corporation, as by the said writ and declaration is above supposed, &c. Taking this plea as true, it goes to the whole cause of action. It is a special traverse of a material allegation of the declaration, to wit: That the defendant is a corporation. If there is no corporation, then the action must be defeated. It is claimed, however, that the plea of the general issue and the plea of nul tiel corporation are inconsistent and repugnant. That one wars upon the other; that the one denies what the other admits. Our statute provides that the defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense. "I take it to be well settled that when several pleas in bar are pleaded in virtue of this statute to one and the same thing or demand, each of them is treated, and operates as if it were treated, alone." It being an established rule that one of them cannot, in the language of Ch. J. Willes,

"be taken in to help or destroy another, but that every plea must stand or fall by itself." Commenting on a similar statute in England, Mr. Gould, p. 433, sec. 26, says: "Many questions have heretofore arisen as to what several defenses in bar may be pleaded together under this statute to one and the same demand; and a copious catalogue of such pleas as may, and of such as may not, be thus pleaded together, is presented in Conryn's Digest Pleader, E 2. For an opinion was formerly entertained that mere inconsistency between two given pleas was a decisive objection to their being pleaded together under the statute. But if such a rule should prevail, the statute would in a great measure be practically repealed. For the general issue, which is almost universally the first of the several pleas pleaded together under the statute, is on strict common-law principles inconsistent with almost every special matter of defense whatever. At this day, however, it appears to be generally understood as a sound rule in the construction of the statute, that mere inconsistency between two or more pleas in bar is no objection
97 to their being pleaded together; a rule which would appear to follow, of course, from one before laid down, viz: "That each of several pleas thus pleaded together is to be considered as independent of all the others, and to operate as if pleaded alone." Of course this doctrine only applies to those pleas which require the same mode of trial. Pleas of abatement and bar cannot be pleaded together, even under this statute. It seems to me, therefore, that the plea of nul tiel corporation filed by the defendant was a plea in bar; that it had a right to file the same, and that the sustaining of the demurrer thereto was error. On this subject, however, the majority of the court are at variance with me.

A number of exceptions have been taken to the instructions, and it becomes important to examine them.

The first instruction given by the court is as follows: "In order to entitle the plaintiff to a verdict, it is incumbent on him to establish, 1st. That the injuries complained of by him resulted directly from the negligence of the servants or agents of the defendant while engaged in doing what was within the scope of their authority and agency to do. That the culpable negligence of the plaintiff did not contribute to occasion such injury; that is to say, that the plaintiff did not on this occasion complained of omit to exercise such efforts and caution to avoid the accident and injury as a man of ordinary prudence and circumspection placed in the same circumstances would have exercised." It is claimed by the appellant that the instructions given do not embrace the law; that if the plaintiff was guilty of any negligence, that fact alone would preclude a recovery. I am unable to accede to this proposition. It is conceded by text-writers that all the American decisions upon this question have been professedly based upon the English precedents, and that if we can ascertain what was the real meaning of the English decisions thus cited they should have controlling influence. Their conclusions are generally so reasonable and so clearly expressed, that but little hesitation can be felt in relying upon them as fur-
98 nishing the true rule. In Butterfield vs. Forrester, 11 East., 60, Lord Ellenborough says: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right; one person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support the action: an obstruction in the road by the fault of the de-

fendant, and no want of ordinary care to avoid it on the part of the plaintiff."

In the case of Rudge vs. The Grand Junction Railway Company, 3 M. & W., 244, Parke, B., says: "The rule of law is laid down with perfect correctness in the case of Butterfield vs. Forrester; and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind." In the case of Davies vs. Mann, 10 M. & W., 545, the same subject is considered, and it is there held that the plaintiff is entitled to recover notwithstanding he may be guilty of some negligence, if the defendant might by proper care have avoided inflicting the injury. To the same effect is the case of The B. & O. R. R. Co. vs. Fitzpatrick, 35 Md. Am. L. Register, N. S., vol. 11, 596.

I think the true rule is, and should be, that if the plaintiff exercise reasonable care, though he may have been guilty of some negligence or want of caution, he is still entitled to recover for any injury sustained in consequence of the defendant's negligence. To defeat his action he should not only contribute to his injury, but he must be in fault in so doing. If his share in the transaction be innocent and not faulty, it should furnish no excuse for a defendant. (Sherman & Redfield on Negligence, §§ 28, & note 3, p. 16.)

And this doctrine seems to have received the warm approval of the court of appeals in New York. In Fero vs. Railroad Co., 22 N. Y., 215, Bacon, J., says: "It is very possible that by unusual precaution and watchfulness on the part of the plaintiff the consequencies of the defendant's wrong might have been less disastrous; yet, if he was guilty of no culpable negligence, the mere fact that he might have been more vigilant will not excuse the wrongful act of the defendant nor deprive the plaintiff of all redress for the injury he has suffered." So, in Cook vs. Transportation Co., 1 Denio, 91, Beardsley, J., says "there must be some wrongful act or culpable negligence on the part of the plaintiff to bar him on this principle."

99

It seems to me, therefore, that the instructions given lay down the law correctly, and are in no way open to the objection urged by appellant.

The court further instructed the jury "that in fixing the plaintiff's damages they should compensate the plaintiff, not alone for his actual loss of time during his confinement or disability, if any, resulting from the alleged accident, but might award exemplary damages proportioned to the nature and extent or character of the injury," saving the question of exemplary damages for subsequent comment. I am of the opinion that the court below was quite favorable to the defendant in laying down the rule of damages in this case. When an injury is received of such extent and character as must disable one from labor and require nursing and medical treatment, the loss from inability to labor and the expense of medical treatment are the necessary and uniform consequences of such an injury. They are not special damages in the sense of the term as it is used in the law of pleading and evidence; they are not caused by an incidental fact or by the peculiar situation of the party, but are the natural and uniform effects of such injury. In addition to the mere expenses of nursing and medical treatment, it has been held that a party suffering from injury occasioned by the

neglect of another is entitled to recover for his bodily pain and mental suffering, and evidence is admissable to show the loss he has sustained by reason of his failure to prosecute his business. (Swarthout
100 vs. New Jersey Steamboat Co., 46 Barb., 222; Nebraska City vs. Campbell, 2 Black, 591; Wade vs. Leroy, 20 How., 34, 43, 44.) And speaking on this subject, Judge Redfield says: "There can be no doubt of the correctness of this rule; the courts all agree in this." (Am. Law Register, vol. 10, p. 36.) It is claimed by the appellant that the court erred in instructing the jury that the plaintiff was entitled to recover exemplary damages. First, because the negligence, which is the foundation of the suit, was the negligence of the defendant's servants; and second, because the facts of the case disclose no fraud, malice, violence, or cruelty. Indeed, it is strenuously insisted on that, in the absence of gross fraud, malice, or oppression, no exemplary damages can be awarded in any case. It is further intimated that in no event can such damages be allowed against a corporation, notwithstanding the divinity which was anciently supposed to hedge in a corporation and shield it from liability on account of the wrongs done by its agents. These institutions, like all others, have fallen under the dominion of the law, and courts have not only applied to them principals congenial to the present condition of society, but such as have been for a long time applied to the conduct of individuals. We recognize the fact that corporations enter into almost all the concerns of life, political, financial, eleemosynary. They build churches, erect colleges, construct railroads, operate mines, run newspapers, distribute charities, and, in some instances, claim to be the sole custodians of the keys that unlock the gates of glory. In every instance they act through agents, and so acting they may be made responsible in an action on the case for a tort, and even in an action of trespass, if, by their managers and authorized agents, they command the trespass to be committed, or sanction or approve the act when done. (1 Chitty, 87; Underwood vs. Newport Lyceum, 5 B. Monroe, 130.) Artificial as they may be, there is still a human intelligence and volition controlling their affairs, just like those of an individual, and which may act wrongfully, maliciously, and recklessly, thus laying the basis for exemplary damages. Whatever may have been the doc-
101 trine anciently, it is now too well settled to be uprooted, that corporations, like these defendants, which are established and conducted, in whole or in part, for the pecuniary benefit of the members, are liable in actions for torts in the same way and to the same extent as individuals and natural persons. (Railroad vs. Rogers, 28 Ind., 1; Chestnut Hill, &c., vs. Reitler, 4 S. & R., 6; Hawkins vs. Steamboat, 2 Wond., 452; Goodspead vs. Bank, 22 Conn.; Hopkins vs. Railroad, 36 N. H., 9.) And it is equally well settled, that where their conduct is characterized by gross negligence, although there may be an absence of malice and oppression, still they are amendable to exemplary damages. (Hopkins vs. Railroad, 36 N. H., 9; Belknap vs. Railroad, 49 N. H., 358; Herron vs. McCaughan, 32 Miss., 1; Ledger on Damages, 3rd edition, 36.) Textwriters have defined gross negligence to be the want of even slight care and diligence.

In estimating the degree of care which it is encumbent on a person to use, regard must be had to the work to be done, and the place where it is to be done. If a switch were left open so that a passenger train jumped the track, this would certainly be a case of gross negligence, because it would indicate a heedless disregard for human life and for the safety of passengers who entrust themselves to the care of the road. So the leaving open an area in a thoroughfare of a city, without putting

up anything to warn travellers of danger, has a strong character of cruelty and moral turpitude. So when a telegraph wire is found swinging across a public way at such height as to obstruct and endanger ordinary travel, it is in itself unexplained and unaccounted for evidence of negligence. (Thomas vs. West. Un. Tel. Co., 100 Mass., 156.) So, too, it has been held, that when carriers undertake to convey persons by the powerfull but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence; and any negligence in such cases, says Grier, J., deserves the epithet of gross negligence. (Railroad vs. Derby, 14 How., 486.) So, in Shields vs. Blackburn, 1 H. Bl., 161, it is said by Heath, J., "If a
102 man applies to a surgeon to attend him in disorder for a reward, and the surgeon treats him improperly, there is gross negligence;" and Lord Loughborough declares that omission to use skill is gross negligence.

That which is harmless under one state of circumstances becomes highly reprehensible under another. It is claimed, however, that there is nothing in the evidence from which gross misconduct, amounting to recklessness, could be inferred, or that the persons who stretched the wire across Blake street were actuated by wilful or intentional motives to injure the plaintiff or any one else; that they were engaged in a great public work, which commends itself to the protection of the law; that persons engaged in the erection of telegraph wires across the streets of a city are absolutely compelled by law to place such wires in position in the short space of one-half minute, or be liable for gross negligence, is a rule that must be regarded as unreasonable and harsh, for it is absolutely requiring of all who may engage in an enterprise of this kind an impossibility; and instead of making the law a protection to such persons, it would become an engine of oppression. It is but just to the court below to say that the counsel misapprehends and misconstrues the instruction. It does not require the erection of the wire in one-half minute, or in any length of time. What it does require is, that at no time during its erection shall it be left unguarded so that it may become an object of stumbling and a snare to those who travel the public streets. And thus understood, it is far from being unreasonable and harsh. It may be conceded that a company has a right to construct a telegraph-line through the streets of a city, but the exercise of this right or privelege is accompanied by a public duty that cannot be ignored nor disregarded, and that duty is to see that the public suffer no detriment, and that individuals are exposed to no danger through the laches or negligence of the party doing the work. Every precaution must be taken to prevent mishaps. Guards or flags, or other means equally efficacious, should be used to warn the people that the street is obstructed. In this case it does not appear that any precaution whatever was taken;
103 the public were left to learn that there was an obstruction by becoming entangled in it. I can hardly conceive of a case that savors more strongly of gross and culpable negligence. (Clark vs. Fry, 8 Ohio St. Rep., 359; Chicago vs. Robbins, 2 Black, 418.) Nor is it necessary that an intention to inflict injury should exist. The law requires the plaintiff to show nothing of the kind. If the negligence of the defendant is such as to cause injury, and does cause injury, it is immaterial what his intentions are or may be; the result is the same, as is also his liability. (Amich vs. O'Hara, 6 Black, p. 258; Tally vs. Ayres, 3 Sneed, 677.)

That is negligence which the law does not excuse, and it certainly does not excuse an injury inflicted on an individual through carelessness.

It is objected to this instruction that it takes away from the jury the determination of the degree of negligence. The language of the court is substantially: "That if the negligence of the defendant occasioned the injury, then the jury should award exemplary damages." It seems clear that every degree of negligence does not warrant the infliction of such damages. There is a class of acts extremely injurious to individuals, of which the criminal law takes no cognizance, and yet that which the public interests require shall be punished. I refer to those acts whose commission is attended with fraud, malice, oppression, or gross negligence. When either of these elements mingle in the controversy, the law, instead of adhering to the system of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; *it* other words, it blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferrer, but to punish the offender. When the wrong done to the party partakes of a criminal character, though not punishable as an offense against the State, the public may be said to have an interest that the wrong-doer should be prosecuted and brought to justice in a civil suit, and exemplary damages may in such
104 cases encourage prosecution when a mere compensation for the private injury would not repay the trouble and expense of the proceeding. But it is only when these elements, or one of them, enter into the act, that this species of damages is allowed. Fraud, and malice, and negligence are by no means identical in their nature and effect. Fraud is a deceitful practice or wilful design, resorted to with intent to deprive another of his right or in some manner to do him an injury. It is always positive; the mind concurs with the act; what is done is done designedly and knowingly; but in negligence, whatever may be its grade, there is no purpose to do a wrongful act or to avoid the performance of a duty. There is, however, an absence of proper attention, care, or skill. It is strictly nonfeasance, not malfeasance. This is the general idea, and it marks the distinction between negligence and fraud. In the first there is no positive intention to do a wrongful act, but in the latter is ever designed or intended, and this seems to be equally true of malice. (Gardener vs. Heartt, 3 Denio, 232, 237.)

Beardsley, C. J., in Railroad vs. Munger, 5 Denio, 267, says, "Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act."

It must not be overlooked, however, that there is a strong tendency in the courts to ignore these degrees of negligence which owe their birth to the civil law, and which were engrafted on the common law. Speaking on this subject, Curtis, J., in Steamboat vs. King, 16 How., 475, says, "It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degrees thus described may not only be confounded with another, but it is quite impracticable to distinguish them. Their significance necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation."

105 He further adds, "Recently the judges of several courts have expressed their disapprobation of these attempts to fix degrees of diligence by legal definitions, and have complained of the impracticability of applying them." (Wilson vs. Brett, 11 M. & W., 113; Wyld vs. Peckford, 8 ibid., 443, 461, 462; Heuton vs. Dibbin 2nd, 2 B., 646, 651.) It may be added, that some of the ablest commentators on the Roman law

and on the civil code of France have wholly repudiated this thing of three degrees of negligence as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. In the case in 13 Wallace it would seem to be clearly deducible, from the language of Mr. Justice Field, that all degrees of negligence are ignored by that court. In the case of the Railroad vs. Heaton, 37 Ind., 455, the court treat these degrees of negligence with manifest disfavor. So, also, in Davis vs. Graham, 4 Ohio Ste., 362. In Steinweg vs. Railway, 43 N. Y., 123, the court say, "that the defendant, a corporation, was liable, if there was negligence on its part, without regard to any supposed distinctions or degrees of negligence." It is strenuously insisted on by the appellant that the court should have submitted to the jury the question of gross negligence; that it is a question of fact for the jury, and not one of law for the court. We cannot accept this as being the true doctrine in the broad language in which it is stated. Sometimes negligence is regarded as a simple question of fact; sometimes as a mixed question of law and fact; and not infrequently as a pure question of law. Speaking on this subject, Judge Redfield says: The question whether a party has been negligent in a particular case, is one of mingled law and fact. It includes, indeed, two questions, whether a particular act has been performed or omitted, and (2,) whether the performance or omission of this act was a breach of a legal duty. The first of these is a pure question of fact; the second a pure question of law. The extent of the defendant's duty is to be determined by a consideration of his circumstances, and though the law defines the duty,
106 the question whether the circumstances exist, which impose that duty upon a particular person, is one of fact. When the facts are clearly settled, the court should decide the case as a matter of law. (Sherv. & Redf. on Neg., p. 12.) The facts which show the existence of gross negligence are uncontroverted. We have the case of a company erecting a telegraph-wire in the streets of a city where people are constantly passing and repassing. We have the fact that this wire was suspended across the street at a distance from the ground calculated to obstruct and entangle people as they passed. We have the further fact that no guards were stationed nor flags put up to warn people of the pending obstruction. The omission to use these precautions was a plain breach of a public duty. Although these facts were uncontroverted, the court still submitted them to the jury, and they were told that if they found them to exist, they would be justified in awarding punitive damages. In this there was no error.

It is claimed, however, that the evidence fails to show that the wire was being erected under the direction of the defendant. We are of a different opinion. The facts disclosed are as follows: B. T. Woodward was in the employ of the defendant as operator and manager at this place, subordinate, however, to Hibbard, who was the defendant's superintendent for the 3rd division. Clowry was also in the employ of the defendant as superintendent of the 2nd division. Woodward, under directions from Hibbard, employed Washburn to put up the line. The expenses were reported to Clowry, and the money to adjust them forwarded by him. Here, then, we have these superintendents of the defendant all engaged in the work of erecting a line, and their conduct supplemented by the further fact that the line is used by the company, and the money arising therefrom placed in the general treasury. If corporations are invisible and intangible, this one comes quite prominently into view through gentlemen who fill its offices and manage its affairs.

It is claimed, however, that all this does not show that these superintendents had authority from the company to do this work. By the general rules of evidence, presumptions are continually made in cases
107 of private persons of acts even of the most solemn nature, when these acts are the natural result or necessary accompaniment of other circumstances. For instance, it presumes that every man in his private and official character does his duty until the contrary appears. It will presume that a man acting in a public office has been rightly appointed.

The same presumptions are applicable to corporations. Persons acting publicly as officers of the corporation are presumed to be rightfully in office. Acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed. Each affords presumptions, from acts done, of what must have preceded them as matters of right or matters of duty. (Bank vs. Dandridge, 12 Wheaton, 69–70; Spilman vs. Foster Iron Co., 56 Barb., 151; Railway vs. James, 24 Wis., 392.)

In the absence of any direct proof as to the authority of these superintendents, the jury were warranted in presuming that they had it.

It is further objected that the court erred in permitting the appellee to question Woodward about a supposed contract. This contract was not offered in evidence. The interrogatories simply went to its existence. What it did or did not contain, or whether it existed at all, does not appear. We do not think that this attempt to prove a contract had any influence with the jury. If any injury was apprehended from this the appellant should have asked the court for an instruction, and, failing to do so, the question cannot be raised here. (Penock vs. Dunlogan, 2 Peters, 15.)

Complaint is made because the court allowed the plaintiff to introduce the ordinances of the city of Denver. These were clearly admissible, not only to show that Blake street was a highway, but also on the question of negligence. (Railroad vs. Toffe, 37 Ind., 376; Rail-
108 road v. Fitzpatrick, 35 Ind.; Chicago vs. Robbins, supra.)

Other points are made which we have carefully examined. We are all of the opinion that no error was committed on the trial of this case, and the judgment is therefore affirmed.

(Indorsed:) Western Union Tel. Co. vs. Charles Eyser. Opinion. Filed Sept. 6, 1873. David W. Crater, clerk.

Supreme Court.

WESTERN UNION TELEGRAPH CO.,
vs.
EYSER.

WELLS, J.:

No opinion is expressed upon the question whether the plea of nul tiel corporation may be pleaded in bar or not; but the majority of the court are of the opinion that the defendant cannot deny its own capacity by a plea, pleaded either alone or with other pleas, in abatement or in bar. If the defendant be not a corporation, then it is nothing; it cannot appoint an attorney; it cannot, by attorney or otherwise, be present

in court; it cannot plead, for it is not; the plea is therefore felo de se. (The President & Trustees, &c., vs. Wadliegh, 6 Blf., 297.)

The demurrer to this plea was therefore properly sustained. Upon the other questions the opinion of Mr. Justice Belford is the opinion of the whole court.

Let the judgment of the district court be affirmed.

(Indorsed:) The Western Union Tel. Co. vs. Eyser. Opinion of Wells, J. Filed September 6, 1873. David W. Crater, clerk.

109 And afterwards, to wit, on the 8th and 9th days of October, A. D. 1873, there was filed in the office of the clerk of the supreme court of Colorado Territory a certain power of attorney in said cause, together with a bond executed by virtue of said power of attorney; an original writ of error and citation, with proof of service endorsed thereon, which said original writ and citation are hereto attached, together with copies of said power of attorney and bond, and are respectively in words and figures following, to wit:

Power of attorney.

110 Know all men by these presents that the Western Union Telegraph Company, a corporation duly organized and existing under and in virtue of the laws of the State of New York, has made, constituted, and appointed, and by these presents does make, constitute, and appoint, Benjamin F. Woodward, of Denver, in the Territory of Colorado, its true and lawful attorney, for it and in its name, place, and stead, to make, sign, seal, acknowledge, and deliver all and singular such bonds, obligations, undertakings, securities, or stipulations in writing as shall or may be required or designated by law or be deemed by him to be expedient or necessary to obtain, secure, perfect, or prosecute any writ of error or appeal from or to stay the execution of or proceedings upon a judgment or decree heretofore rendered by the supreme court of the Territory of Colorado, in an appeal or proceeding in error wherein the Western Union Telegraph Company is appellant and Charles Eyser is appellee, from a judgment of the district court of Arapahoe County, in said Territory, rendered in favor of the said appellee against the said appellant in an action of trespass upon the case heretofore pending in said district court; and also to apply or petition for and obtain allowance of any citation, appeal, or writ of error from such judgment or decree to the Supreme Court of the United States; and also to indemnify sureties upon any such bonds or other securities or stipulations as aforesaid; giving and granting unto its said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as the said company might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that it' said attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof.

In witness whereof, the said Western Union Telegraph Company has caused its corporate seal to be hereunto affixed, and its corporate
111 name to be hereunto subscribed, by the hand of its president, and these presents to be attested by its secretary, this the first day of October, in the year one thousand eight hundred and seventy-three.

WESTERN UNION [SEAL.] TELEGRAPH CO.

THE WESTERN UNION TELEGRAPH CO.,
By WILL'M ORTON,
President.

Attest: GEO. H. MUMFORD, *Sec'y.*

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this first day of October, A. D. 1873, before me, Charles Nettleton, a commissioner of the Territory of Colorado in and for the State of New York, residing in said city of New York, personally appeared William Orton, the president of the Western Union Telegraph Company, and George H. Mumford, the secretary of the same company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say: That he, said William Orton, resided in the city of New York; that he, said George H. Mumford, resided in the city of Brooklyn; that he, said William Orton, was the president, and he, said George H. Mumford, was the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the executive committee of the board of directors of said company, and that they, the said William Orton and George H. Mumford, signed their names thereto by the like order as president and secretary of said company respectively; and they further acknowledged the same as their own act and deed, respectively, and as the act and deed of the said company.

112 In witness whereof I have hereunto set my hand and affixed my official seal this first day of October, A. D. 1873.

[SEAL.] CHARLES NETTLETON,
Commissioner for Territory of Colorado in New York, 117 Broadway, N. Y. City.

At a meeting of the executive committee of the Western Union Telegraph Company, held at the office of the company, No. 145 Broadway, in the city of New York, on the first day of October, in the year 1873, a majority of the members of said committee being present;

On motion it was

Resolved, That the president of this company do subscribe the corporate name of this company, and do affix its corporate seal to, and that the secretary do sign and attest as secretary, and that the president do forthwith, after such signing and sealing, deliver, as the deed of the company, an instrument in the words following, namely:

Know all men by these presents, that the Western Union Telegraph Company, a corporation duly organized and existing under and in virtue of the laws of the State of New York, has made, constituted, and appointed, and by these presents does make, constitute, and appoint, Benjamin F. Woodward, of Denver, in the Territory of Colorado, its true and lawful attorney, for it and in its name, place, and stead, to make, sign, seal, acknowledge, and deliver all and singular such bonds, obligations, undertakings, securities, or stipulations in writing as shall or may be required or designated by law, or be deemed by him to be expedient or necessary to obtain, secure, perfect, or prosecute any writ of error or appeal from or to stay the execution of or proceedings

113 upon a judgment or decree heretofore rendered by the supreme court of the Territory of Colorado in an appeal or proceeding in error, wherein the Western Union Telegraph Company is appellant and Charles Eyser is appellee, from a judgment of the district court of Arapahoe County, in said Territory, rendered in favor of the said appellee against the said appellant, in an action of trespass upon the case theretofore pending in said district court. And also to apply or petition for and obtain allowance of any citation, appeal, or writ of error from such judgment or decree to the Supreme Court of the United States, and

also to indemnify sureties upon any such bond or other securities or stipulations as aforesaid; giving and granting unto its said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as the said company might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that its said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

It is further resolved that the secretary be, and he is, authorized to annex to the power of attorney, above authorized, a copy of the minutes of this meeting pertaining thereto, and also to affix to such copy the seal of this company.

STATE OF NEW YORK,
City & County of New York, ss:

I have compared the foregoing with the original resolutions duly passed by the executive committee of the board of directors of the Western Union Telegraph Company, at a meeting of said executive committee, duly held at the office of said company, at No. 145 Broadway, in the city of New York, as the same duly appear duly recorded in their proper places in the records of
114 the proceedings of said board, and hereby certify the same to be a correct transcript therefrom and of the whole of said originals. And I hereby further certify that the following named directors of said company, constituting a majority of the said executive committee, were present at the said meeting and voted in favor of the adoption of the said resolutions, to wit: William Orton, A. B. Cornell, Harrison Durkee, O. H. Palmer, Augustus Schell, John Steward, E. B. Wesley.

In witness whereof I have hereunto set my hand and affixed the corporate seal of the said Western Union Telegraph Company at the said city of New York, this first day of October, one thousand eight hundred and seventy-three.

WESTERN UNION [SEAL.] TELEGRAPH CO.

GEO. H. MUMFORD, *Sec'y.*

STATE OF NEW YORK,
City & County of New York, ss:

Be it remembered that on this first day of October, A. D. 1873, before me, Charles Nettleton, a commissioner of the Territory of Colorado in and for the State of New York, residing in said city of New York, personally appeared George H. Mumford, to me personally known, and known to me to be the secretary of the Western Union Telegraph Company, and the same person described in and who executed the foregoing certificate. And the said George H. Mumford being by me duly sworn, deposes and says that he resides in the city of Brooklyn; that the said Western Union Telegraph Company is a corporation duly organized and existing under the laws of the State of New York; that he is the secretary thereof; that he knows the corporate seal of said corporation and has the custody of said corporate seal; that the seal affixed to the
115 foregoing certificate is the said corporate seal of the said Western Union Telegraph Company, and was thereto affixed by authority of the executive committee of the board of directors of said company; and that he subscribed his own name thereto by the like authority as secretary of the said company.

In witness whereof I have hereunto set my hand and affixed my official seal this first day of October, A. D. 1873.

[SEAL.] CHARLES NETTLETON,
Commissioner for the Territory of Colorado in New York,
117 *Broadway, N. Y. City.*

(Indorsed:) The Western Union Telegraph Company to Benjamin F. Woodward. Power of attorney. Dated October 1st, 1873. Filed Oct. 8, 1873. David W. Crater, clerk. Porter, Dorsey & Soren, 78 Broadway, N. Y.

116 *Bond.*

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, plaintiff in error,
vs.
CHARLES EYSER, DEFT. IN ERROR.

Know all men by these presents that we, the Western Union Telegraph Company, who executes this bond by Benjamin F. Woodward, its attorney in fact, duly authorized hereto, Benjamin F. Woodward and B. F. Bush are held and firmly bound unto Charles Eyser in the sum of twelve thousand dollars, to be paid to the said Charles Eyser, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated at Denver, in the Territory of Colorado, this 2d day of October, A. D. 1873.

Whereas the above-named the Western Union Telegraph Company hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled
117 suit by the supreme court of the Territory of Colorado, now, therefore, the condition of the obligation is such, that if the above-named the Western Union Telegraph Company shall prosecute its said writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY, [SEAL.]
By B. F. WOODWARD, [SEAL.]
Its Attorney in Fact.
B. F. WOODWARD. [SEAL.]
B. F. BUSH. [SEAL.]

Sealed and delivered in the presence of—
ALFRED C. PHELPS.

I hereby certify that the erasure and change of date in the foregoing bond was made before delivery, and that the same was authorized and sanctioned by the parties executing the same & each of them.

A. C. PHELPS.

Oct. 2d, 1873.

(Endorsed:) In the Supreme Court of the United States. The Western Union Telegraph Company, pl*ff*. in error, vs. Charles Eyser, deft. in error. Bond approved. E. T. Wells, judge, &c. Filed October 8, 1873. David W. Crater, clerk.

Original writ of error.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the Territory of Colorado, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between the Western Union Telegraph Company and Charles Eyser, a manifest error hath happened, to the great damage of the said The Western Union Telegraph Company, as by its complaint appears; we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Nathan Clifford, the first in precedence of the associate justices of the said Supreme Court, the 8th day of October, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] DAVID W. CRATER,
Clerk of the Supreme Court, Colorado Territory.

119 (Indorsed:) In the Supreme Court of the United States. The Western Union Telegraph Company, plaintiff in error, vs. Charles Eyser, defendant in error. Writ of error allowed. E. T. Wells, associate justice sup. ct. Filed Oct. 8, 1873. David W. Crater, clerk.

120 UNITED STATES OF AMERICA, *ss:*

To Charles Eyser, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Colorado, wherein the Western Union Telegraph Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf. Witness the honorable Ebenezer T. Wells, associate justice of the supreme court of the Territory of Colorado, this 8th day of October, in the year of our Lord one thousand eight hundred and seventy-three.

EBENEZER T. WELLS,
Associate Justice Supreme Court, Colorado.

121 TERRITORY OF COLORADO,
Arapahoe County, ss:

On this 9th day of October, A. D. 1873, A. C. Phelps, being duly sworn according to law, on oath says that on the 8th day of October, A. D. 1873, he duly served the within citation by delivering to Samuel E. Browne

and T. G. Putnam, the attorneys of the said Charles Eyser, defendant in error, named in the within, a true and correct copy of the said citation, exhibiting and showing to them at the same time the within original citation, and further deponent says not.

ALFRED C. PHELPS.

Subscribed and sworn to before me the said 9th day of October, A. D. 1873.

[SEAL.] DAVID W. CRATER,
Clerk Supreme Court, Colorado Territory.

(Indorsed:) In the Supreme Court of the United States. The Western Union Telegraph Company, plff. in error, vs. Charles Eyser, defendant in error. Citation. Filed October 9, 1873. David W. Crater, clerk.

122 TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, David W. Crater, clerk of the supreme court of Colorado Territory, do hereby certify that I have compared the above and foregoing copy of all proceedings had and entered of record and of the papers filed in said supreme court in a cause lately pending therein, wherein the Western Union Telegraph Company was appellant, and Charles Eyser was appellee, with the original record and papers now remaining in my office, and that the same are true and perfect transcripts therefrom, and the whole of their respective originals, and further certify that the writ of error and citation, with proof of service indorsed thereon, are the respective original writ and citation heretofore filed in my office, and that a copy of said original writ of error and citation, with proof of service thereon, is remaining on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said supreme court, at Denver, this 15th day of November, A. D. 1873.

[SEAL.] DAVID W. CRATER,
Clerk of Supreme Court of Colorado Territory.

(Indorsed:) In the Supreme Court of the United States. The Western Union Telegraph Company, plaintiff in error, vs. Charles Eyser, defendant in error. Error from the supreme court of Colorado Territory.

(Indorsement on cover:) No. 345. Territory of Colorado, sup. ct. The Western Union Telegraph Company, plaintiff in error, vs. Charles Eyser. Filed 1st December, 1873.

Supreme Court United States.

OCTOBER TERM, 1875.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

vs.

CHARLES EYSER, Defendant in Error.

No. 118.

In Error to the Supreme Court of the Territory of Colorado.

BRIEF OF PLAINTIFF IN ERROR.

J. HUBLEY ASHTON,
GROSVENOR PORTER LOWREY,
Of Counsel.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1875.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error.

vs.

CHARLES EYSER, Defendant in Error.

No. 118.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action on the case instituted by Eyser against the Western Union Telegraph Company, in the district court of Arapahoe county, Colorado, to recover damages for injuries sustained by him in consequence of being thrown from his horse at the corner of Blake and F streets, in the city of Denver, by coming in contact with a telegraph wire which was being put up on a pole at the time of the accident, and which was stretched, when the plaintiff's horse came in contact with it, along the outer edge of the sidewalk, a short distance from the ground.

The declaration averred that the injury was caused by the negligence of defendant's servants. (Rec., p. 3.)

The pleas were: 1st. General issue; 2d. *Nul tiel* corporation; 3d. Contributory negligence of plaintiff; 4th. Negligence and primary liability of the city of Denver. (Rec., pp. 4 and 5.)

Plaintiff demurred to 2d, 3d, and 4th pleas. (Rec., fol. 11, p. 6.)

The court sustained the demurrer. (Rec., p. 6, fol. 12.)

The case was tried upon the plea of the general issue. The jury found a verdict for the plaintiff, and assessed his damages at $5,000. (Rec., p. 8, fol. 15.)

The Supreme Court of the Territory affirmed the judgment of the District Court. (Rec., p. 49.)

The general facts of the case were these: On April 18, 1870, a telegraph wire was being erected in the city of Denver, at the corner of Blake and F streets. The wire had been lifted from the ground a very few minutes before the accident in question, for the purpose of being carried to the top of a telegraph pole on F street about 125 feet from corner. The man who had it in his hands had climbed nearly to the top of the pole, when the plaintiff, Eyser, came down Blake street on horseback at a rapid gait. The horse came in contact with the wire, and fell, with the plaintiff under him. The occurrence was witnessed by a number of persons who were standing near or about the corner, looking at the men put up the wire. Several persons hallooed to him to stop. Plaintiff admitted that he heard the cry before he struck the wire.

The accident occurred in mid-day, about a quarter before twelve o'clock in the morning.

George J. Washburne and B. F. Woodward were in charge of the work.

They testified that the wire was stretched along the outer edge of the sidewalk outside of the poles. (Woodward, p. 36, fol. 65.) It had been run off from the wire-wagon, and, after being stretched with pulleys, was fastened to a pole about a foot from the ground. (Washburne, Rec., p. 34, fol. 61.) The wire was then carried by a man to the top of the pole, on which it was to be placed. The wire was a little more than a foot from the ground at the time of the accident.

Washburne testified:

"This wire had been elevated from the ground before the accident, about as long as it would take a man to climb a sixteen feet ladder and about eight feet of pole, with climbers, not to exceed two or three minutes, I think. The man had climbed the pole nearly to the top . . . . I don't think there was much delay in getting up there, except getting it over some obstructions there, signs, &c. Think the whole time in getting it up wouldn't exceed two or three minutes. The same care and diligence was used as we always use. I instructed the men I had (there were three men stationed there at the corner) to keep people off the wire." (Rec., pp. 33, 34.)

Mr. Woodward testified:

"I was near where the accident occurred in April, 1870. I was standing on F street, near to, opposite Haywood & Co.'s store, looking at the man going up the pole with the wire, with face in that direction. The wire was being carried up on a pole. This was to attach (it) to an insulator. I heard a violent concussion, and noticed a jerking of the wire, and when I turned and looked in that direction I could see no cause for it at first. Immediately after I saw Eyser. On that corner there was a sign post; quite a crowd of lookers on watching the work. . . . . The wire was on the outside, next to the street, of post at Kassler's corner. When the horse came back he struck the wire. It seemed to me that when the horse struck the wire, it was almost under his breast. He seemed to rear and try to jump over it, and, instead of clearing it, carried it with him and fell. He fell on his knees and on his side a little, and jumped up and ran off. . . . . The wire wasn't much jerked in the hands of the man on the pole. I think he let go and threw his arms around the pole. Think the wire didn't fall to the ground." (Rec., p. 36.)

Eyser, the plaintiff, testified that he was riding from his house on Blake street—the "German House"—to go to his son-in-law. *His house was the seventh house from the place where the accident occurred, about the middle of the block.* (Rec., p. 17, fol. 31, 32.)

When he came on the west side of F street, crossing F, his horse became entangled in the telegraph wire and

became unmanageable and fell with him. And that was all he knew about it. He was senseless after he fell. (Rec., p. 16, fol. 29.)

He admitted that he had drank about four or five glasses of lager beer that morning. (Rec. p. 16, fol. 30.)

He kept a bar in his hotel—*liquors*. (Rec., p. 17, fol. 32.)

He said he did not see the wire before he was thrown, but admitted he heard somebody call out "*Charley, Charley!*" and, on cross-examination, he said he was about fifteen feet from the wire when he heard the cry, but he would not swear positively he was not further off. (Rec., p. 16, fol. 30; p. 17, fol. 32.)

He also testified that when he left his house to ride that way, he saw some folks at the corner of F street; that he saw a man to the left when he rode up on the pole; that he meant by the left up F street; and that he thought he (the man on the pole) was about 100 *feet from corner of F and Blake streets.* (Rec., p. 16, fol. 30.) He said his eyesight was good, but he had to use specs. to read; and if he had noticed the wire, he "*might have seen it fifteen or twenty feet off; might further in the light overhead.*" (Rec., p. 17.)

He also said he was riding at a middling trot when he was thrown—an ordinary trot. (Rec., p. 16, fol. 30.) The horse he rode was a young stallion. (Rec., p. 17, fol. 32.)

Salomon, a witness for the plaintiff, testified that he was going in a *lope*, and that he (the witness) heard the call to the plaintiff. (Rec., p. 25, fol. 46.)

Henry Kerr, a witness examined by defendant, testified that the wire was stretched along the gutter of F across Blake; that when he first saw Eyser, he was probably a little this side of the middle of F street, and on the crossing of Blake and F; that he thought he was from fifteen to eighteen feet from the wire, more or less; that the wire was then stretched a foot and a half or two feet high; *that when he first saw him, he was in a lope or gallop; that he hal-*

looed to him to look out, and he then checked his horse, and his horse then struck a trot, and struck the wire. (Rec., p. 30, fol. 55.)

Jos. E. Bates, also witness for defendant, testified that he saw Eyser on the horse before the accident; that the horse appeared to be unmanageable—a colt, and he (the witness) stopped to watch the performance; that he was afraid Eyser would get thrown; that he (Eyser) was about the width of the street from the wire when he first saw him, the street being eighty feet wide; that when he first saw him the horse didn't seem inclined to move forward much, and he (Eyser) was urging him; that the horse seemed just being brought into use; when he would strike him the horse would seem to go beyond his control—seemed to be unmanageable; that the horse had passed the wire, and got beyond it on Blake street and then took a change in towards the building, and then made a change toward F, and then struck the wire; *that he was watching all the time, because he was afraid he would get hurt;* and that the conduct of the horse when he came into the locality of the wire seemed to be very wild—unmanageable.

He further said: "As he approached the wire, after I first saw him, the horse was rearing and plunging and jumping, and the conduct of the rider about that of any other man on such a horse. There was quite a number of men gathered around; some of them were in front of me." (Rec., p. 31.)

This witness also said that he was apprehensive of danger when he first saw the horse, and more so when he saw plaintiff passing towards the wire. (Rec., p. 33, fol. 59.)

B. F. Busch, also a witness for defendant, testified that *his attention was first called by some one calling, saying, "Look out, Charley;"* that he turned round, and saw Eyser was near the centre of F and Blake streets; that a moment afterwards he struck the wire; that his impression was he got over it, but not positive; that the horse seemed

to become unmanageable, and jumping around the corner of Kassler's, fell over the wire; that he did not think the horse could have got into the wire and taken the course he did without getting over it, but he didn't know; that the wire slackened up; that he was in a lope, about five miles an hour; that he did not observe the conduct of the horse and rider on that occasion till he struck the wire. (Rec., p. 33.)

Arthur W. Brinker testified that when he first saw Eyser he was in the middle of Blake street, about twenty feet from the northern gutter of F, at crossing of Blake; he was loping along, not fast, a little over a moderate gait; he (the witness) hallooed for him to stop; don't remember that he heard any others; *he hallooed loud enough to be heard; hallooed to him to stop;* he kept on, however, without heeding the warning. (Rec., p. 35.)

The plaintiff was confined to his bed about three weeks, and testified that he walked on crutches, more or less, about forty days. (Rec., p. 16, fol. 31.)

The declaration averred the medical expenses were $150, and estimated his loss of time at $500. (Rec., p. 3, fol. 7.)

It was proved that, at the time of the trial, he had not paid anything for medical attendance. (Rec., p. 23, fol. 43.)

The court accordingly instructed the jury not to allow the doctor's bill, in estimating the actual damages sustained by plaintiff. (Rec., p. 40, 41, fol. 73.)

The plaintiff appears to have been a hotel keeper, and a carpenter and general contractor, at the time of the accident, and could earn, when employed, from five to six dollars a day. (Rec., p. 17.)

He was not working, it would seem, at the time of the accident.

It is clear that the damages given by the jury, under the charge of the court, were largely EXEMPLARY or VINDICTIVE damages.

Assignment of Errors.

The Court erred:

1. In sustaining plaintiff's demurrer to defendant's second plea.

2. In sustaining plaintiff's demurrer to defendant's third plea.

3. In refusing defendant's *first* prayer for instruction, that the burden of proof in this action was upon the plaintiff to show, not only defendant's negligence, but that he himself was not guilty of negligence or carelessness, before he was entitled to recover. (Rec., p. 37.)

4. In refusing defendant's *fourth* prayer for instruction, "that if the jury believe from the evidence that the plaintiff in this case contributed to the bringing about the accident in this cause, by his own negligence or want of care, then they must find for the defendant, even though they should believe from the evidence that the defendant had been also guilty of negligence or want of ordinary care." (Rec., p. 37.)

5. In refusing the defendant's *second* prayer, "that if the jury believe from the evidence that the injury to the plaintiff in this case was the result of the fault or negligence of the plaintiff, or the fault or negligence of both the plaintiff and defendant, without any intention on the part of the defendant, then the plaintiff cannot recover, and the jury must find for the defendant." (Rec., p. 37.)

6. In instructing the jury as follows: That, to entitle the plaintiff to a verdict, it must appear that his "culpable negligence did not contribute to occasion the injury; that is to say, that the plaintiff himself did not on the occasion complained of omit to exercise such efforts and caution to avoid the accident and injury as a man of ordinary prudence and circumspection placed in the same circumstances would have exercised." (2d Instruction, Rec., p. 39.)

7. In instructing the jury as follows: That "if the jury believe that those who erected the wires had authority from defendant in the first instance, and that said wires

were erected in a negligent manner, and that the injuries complained of by plaintiff resulted in any degree from this negligence, then the jury will also consider whether the plaintiff was guilty of culpable negligence, which contributed to produce such injuries. And if the injury complained of resulted without negligence of the defendant, or from the negligence of the defendant and the culpable negligence of the plaintiff, as above defined, combined, the plaintiff cannot recover. (3d and 4th Instructions, Rec., p. 39.)

8. In instructing the jury as follows: "But if the plaintiff was riding at a rate not faster than a man of ordinary prudence and circumspection would have ridden at that time and place, and notwithstanding the warning alleged to have been given, could not have checked his speed by the exercise of such exertion as a man of ordinary prudence would have exercised upon the same warning, and in the same circumstances, then the plaintiff was not guilty of culpable negligence in omitting to heed such warning." (7th Instruction, p. 40.)

9. In instructing the jury as follows:

"If the defendants' agents and servants, acting within the scope of their authority from defendant, were engaged in constructing a telegraph line in the city of Denver, and in such construction, stretched a wire across one of the public and frequented streets of said city, during the hours of the day when such streets are wont to be frequented, and suffered such wire to remain stretched across said street, and elevated such distance above the ground as to obstruct or entangle the feet of a horse passing upon said street for the space of one-half minute to a longer period, and if, unless such wire was of such size and character as to be easily seen by persons approaching at a moderate speed, defendants' agents omitted to station flag sentinels, or other sufficient means of warning, to warn or notify passers-by of the place such wire was stretched, or if defendants' agents did station such sentinels, and they failed to give warning to plaintiff, *then the defendant was guilty of negligence*, and if from such negligence the injury complained of occurred, without culpable negligence on the part of

plaintiff contributing thereto, then the jury ought to find for the plaintiff, and *in fixing the plaintiff's damages should compensate the plaintiff not alone for his actual loss in the loss of time during his confinement or disability, if any, resulting from the alleged accident, but may award* EXEMPLARY *damages proportioned to the nature and extent or character of the injury, and all circumstances of aggravation or extenuation attending the alleged negligence of defendant, and the extent of such damages is to be measured by the sound discretion of the jury in view of all the circumstances, but such damages are not to exceed the damages laid in the declaration,* ($10,000) *ten thousand dollars.*" (10th Instruction, Rec., p. 40.)

The defendant excepted to the refusal of the court to give the several instructions prayed for on its part. (Rec., p. 39, fol. 70.) And also excepted to the giving of the several instructions to the jury, referred to in the above assignment of errors. (Rec., p. 41, fol. 74.)

Argument for Plaintiff in Error.

First Assignment of Error.

This presents only a technical question, and it is submitted upon the views and authorities in the opinion of Belford, J., who thought that the District Court erred in sustaining the demurrer to defendant's second plea.

Record, p. 50, fol. 94, *et seq.*

Second Assignment of Error.

The court below erred in affirming the judgment of the District Court, sustaining the demurrer to defendant's third plea. (See the Plea, Rec., p. 5.)

The plea averred contributory negligence on the part of the plaintiff; and the ground upon which the demurrer was held well taken appears to have been that the plea amounted to the general issue. But it is clear that this view of the plea is erroneous. It is well settled, that it is no test of whether a plea amounts to the general issue that the special matter therein pleaded may be proved

under the general issue. It is only where the plea goes in denial of the declaration that it is objectionable as amounting to the general issue. If it admit the truth of the declaration, it is good. (Gould on Pleading, chap. vi, §§ 78, 94, 95.)

The right of defendant either to plead special matters of defense, or to give them in evidence under the general issue, exists to a great extent in actions of trespass on the case, *ex delicto*. In those actions, defendant may prove under the general issue almost every special matter of defense which conduces to show that, at the time of pleading, he is not liable to plaintiff's demand. (Ex. gr., a license, former recovery, release, accord and satisfaction, &c.) And yet such special defenses may also be, and often are, *specially pleaded.*

Third Assignment of Error.

The defendant, in its *first* prayer, asked the court to instruct the jury that in *this* action the burden of proof was upon the plaintiff to show not only defendant's negligence, but that he himself was not guilty of negligence or carelessness. This instruction was refused; and this refusal is now assigned as error.

I. The prayer did not ask the court to lay down any general rule of universal application as to the burden of proof in an action for negligence, but simply to say that in *this* action, under the circumstances of *this* case, the plaintiff had the burden on him to show affirmatively that he was not guilty of negligence or carelessness.

The accident occurred in open mid-day on a broad public street, 80 feet wide, by a rider running his horse against a telegraph wire so hard as to throw both horse and rider, when it was proved that he was warned of the danger, and heard the warning cry in time to check his horse before he struck, if he had not been riding immoderately and carelessly, and when it was clear that an entirely sober man, with his eyes open, on the look-out for any obstruction in

the road, ought to have seen, and would have seen, what was going on at the corner of the streets long before he came up to the wire. It was proved, moreover, that the plaintiff had been drinking that morning—by his own confession having taken four or five glasses of lager beer since breakfast, enough, we suppose, to stupify any ordinary man.

It was in just such a case as this that the Supreme Court of Pennsylvania held that it was the duty of the plaintiff to "establish a *prima facie* cause of action, resulting *exclusively* from the negligence and wrong of the *defendant*, before the latter need answer at all." (Waters *v.* Wing, 59 Penn., 9 P. F. Smith, 211.)

The *onus probandi*, as it stood upon the indisputable facts of this case, was clearly upon the plaintiff to show that he did not bring on the injury by his own negligence or carelessness.

The Supreme Court of Indiana well said: "It does not follow that, because a person receives a special damage by riding against a public nuisance in a street, he can maintain a suit for the injury, even against the person who put the nuisance there. The declaration, in a suit for such damages, *must show that there was no fault on the plaintiff's part.*" (The President &c. *v.* Dusouchett, 2 Ind., 588.) In that case a demurrer to the *narr.* for want of such an averment was sustained.

The plaintiff here was careful to aver, in his declaration, that he was riding with care, diligence, and proper speed, and without any notice or warning of the obstruction. (Rec., p. 3, fol. 6.)

Surely if there ever was a case in which the burden of proof was on the party injured, under his own testimony, to show that the accident occurred from no want of ordinary care and prudence on his part, this is that case.

He made that averment in his declaration, and his own case, upon his own testimony, cast upon him the burden of proving it, as laid in the declaration.

II. The doctrine that, in an action for negligence, the burden of proof is upon the plaintiff to show affirmatively that he was using due care at the time he received the injury, even if the carelessness of the defendant occasioned it, is settled law in Maine, Massachusetts, Connecticut, Vermont, Illinois, Indiana, Iowa, California, Maryland, Wisconsin, New Jersey, New York, and some other States.

This is said to be the prevailing doctrine. (1 Hilliard on Torts, p. 133.)

The question of burden of proof was presented in a very similar case in the State of *Maine.*

Dickey *v.* Maine Tel. Co., 43 Maine, 495.

In that case plaintiff was traveling in a stage-coach which came in contact with a telegraph wire extending across the way, and was overset.

The court said:

"It was not sufficient for the plaintiffs to prove that the defendants were in fault. To entitle themselves to a verdict, they were bound to show that there was no neglect or want of ordinary care contributing to the injury on the part of the female plaintiff. She was required to exercise due and proper care to protect herself from injury. The burden of proof was on the plaintiffs to show affirmatively the exercise of such due and proper care and vigilance on her part."

See also, for cases in Maine—

Merrill *v.* Hampden, 26 Maine, 234.

Perkins *v.* E. & B. & M. R. R. Co., 29 Maine, 309.

In *Massachusetts*, the law was laid down, in the last case on the subject, as follows: "The plaintiff is required to prove, not only that the defendants were negligent, but also that his own negligence did not in any degree contribute to his injury. *The burden is upon him to show affirmatively that he was in the exercise of due care.*" (Alleyn *v.* B. & A. R. R. Co., 105 Mass., 78.)

The other cases in Massachusetts are to the same effect.

Lane *v.* Crombie, 12 Pick., 177.
Parker *v.* Adams, 12 Met., 415.
Lucas *v.* Taunton R. R. Co., 6 Gray, 64.
Warren *v.* Fitchburg R. R. Co., 8 Allen, 230.
Murphy *v.* Deane, 101 Mass., 466.

In *Connecticut* the law is the same.

Parke *v.* O'Brien, 23 Conn., 345.
Fox *v.* Town, 29 Conn., 209.

In *Vermont* the Supreme Court say, "The exercise of ordinary care is not to be presumed, but must be proved as an affirmative fact, and the burden is on the plaintiff. If the proof is insufficient, the consequences must fall where the *onus probandi* rests."

Hyde *v.* Jamaica, 27 Vt., 465.

In *Illinois* the Supreme Court reversed a judgment below for refusing to give the *precise instruction asked for by the defendant in this case.*

Dyer *v.* Talcott, 16 Ill., 300.
Aurora Branch R. R. Co. *v.* Grimes, 13 Ill., 585.

In *Indiana* the same doctrine prevails.

President, &c., *v.* Dusouchett, 2 Ind., 588.
Evansville R. R. Co. *v.* Hiatt, 17 Ind., 102.

In *Iowa* the Supreme Court say, "There is no doubt but that the burden of proof was on the plaintiff to show to the jury that the accident happened without any want of reasonable care on his part."

Rusch *v.* City of Davenport, 6 Iowa, 451.
Baird *v.* Morford, 29 Iowa, 536.

In *California* the Supreme Court said, "The burden of proof was on the plaintiff to prove that he received the injury from which he sought redress, and that such injury happened without fault on his part."

Ficken *v.* Jones, 28 Cal., 626.

In *Maryland* the law is the same.

Owings *v.* Jones, 9 Md., 108.

In *New Jersey* it is held that if the plaintiff, in his own case, shows that he brought the injury on himself by his own carelessness, he may be non-suited.

Central R. R. Co. *v.* Moore, 4 Zabr., 824.

In *Wisconsin* the Supreme Court held that, in an action for negligence, the *onus probandi* is on the plaintiff to acquit himself of negligence.

Dressler *v.* Davis, 7 Wis., 527.

M. &. C. R. R. Co. *v.* Hunter, 11 Wis., 171.

In *New York*, the Court of Appeals, (Leonard, Com., delivering the opinion,) in one of the latest cases on the subject, said:

"It is the duty of the plaintiff to prove, and the right of the defendant who is charged with negligence, causing an injury, that he should prove, by satisfactory evidence, that he did not contribute to the injury by any negligence on his own part. *This proof, in some form, constitutes a part of the plaintiff's case.*

It must appear, either from the circumstances of the case, or from evidence directly establishing the fact, to the satisfaction of the court and jury, that the plaintiff is free from any fault contributing to the injury. It may be assumed that the plaintiff is anxious for his own safety; but it cannot be presumed that he is free from fault, if nothing else appears in the case, for the reason that some evidence is required to overcome such presumption, and the plaintiff would be thereby relieved from proving, either by direct evidence, or the surrounding circumstances, that he was not in any fault. (Johnson *v.* H. R. R. Co., 20 N. Y., 65; Holbrook *v.* U. & S. R. R. Co., 12 Id., 236; Curtis *v.* Syracuse R. R. Co., 18 Id., 534; Wilds *v.* H. R. R. Co., 24 Id., 430.)

"The circumstances may show, without other evidence, that there was no contributory negligence on the part of the injured party; but that is not a mere presumption." (Warner *v.* N. Y. Central R. R. Co., 44 N. Y., 471, decided in 1871.)

This doctrine was affirmed in the very late case of *Gillespie* v. *City of Newburgh*, (54 N. Y., 471,) decided in 1873.

The leading cases in New York preceding these were the following: *Button* v. *H. R. R. Co.*, (18 N. Y., 248,) decided in 1858, where the Court of Appeals (Strong, J.) said: "The exercise of due care by the intestate was an element of the cause of action. Without proof of it, it would not appear that the negligence of the defendant caused the injury."

The Court of Appeals, in that case, also said: "Where there is conflicting testimony as to the fact, the preponderance must be with the plaintiff to enable him to recover. The party holding it (the burden of proof) must do more than make a balanced case. The scales must ultimately turn in his favor."

In *Johnson* v. *Hudson River R. R. Co.*, (20 N. Y., 69,) decided in 1859, Denio, J., said:

"If one make an excavation or lay an obstruction in the highway, which may or may not be the occasion of an accident to a traveler, it would be reasonable to require a party seeking damages for an injury to give general evidence that he was traveling with ordinary moderation and care."

In a later case (1862) it was said, in the Court of Appeals of New York:

"A party suing for negligence must come into court faultless. He must not present a mere balanced case. The burden of proof is upon him, and he must satisfy the court, by the greater weight of the testimony, that without any carelessness or blame on his part he has suffered an injury from the wrongful act, default, or negligence of the defendant." (Ernst *v.* Hudson River R. R. Co., 24 How., P. R., 97.)

This case came up again, and is reported in the regular series of reports, (35 N. Y., 21.)

The law on this subject of the burden of proof in New

York has received its latest expression in the case in 44 New York, above cited, and seems to be in substantial harmony with the law in the other States above mentioned.

III. But, as we have said, whether or not the rule, that the burden of proof is on the plaintiff, in an action for negligence, to show due care on his part, is a general one of universal application, it cannot be doubted that where, as in this instance, the plaintiff's own case exposes him to the imputation of negligence, he is bound, and the burden is on him, to show the exercise of such a degree of care as was appropriate to the place and the occasion, and that, in the absence of such affirmative evidence on his part, the defendant need not answer at all, and the plaintiff has no ground for a recovery. The law, too, is clear that, upon this question of the plaintiff's negligence, he must not present a mere balanced case. Unless the scales turn ultimately in his favor, there can be no recovery. He must show by the preponderance of the whole evidence that he was free from negligence.

IV. All the recognized tests for determining the burden of proof show that, in this action, it was on the plaintiff to show his freedom from negligence. Undoubtedly, for instance, the effect of striking out of the record the allegation that the plaintiff was riding with due care, would be to destroy his case. And this is said to be one of the best tests of the *onus probandi.* (Taylor on Evidence, § 338; Best on Evidence, p. 371; 1 Greenl. on Ev., § 78.)

Fourth Fifth, and Sixth Assignments of Error.

I. These assignments of error may be considered together.

The defendant, in the *fourth* prayer for instructions, asked the court to instruct the jury as follows: "That if the jury believe from the evidence that the plaintiff in this case contributed to the bringing about the accident by his own negligence or want of care, then they must find for

the defendant, even though they should believe from the evidence that the defendant had been also guilty of negligence or want of ordinary care." (Rec., p. 37.) This prayer was refused, and defendant excepted.

Instead of this charge, the court instructed the jury, that, to entitle plaintiff to recover, it must appear that his "cupable negligence did not contribute to occasion the injury," defining "culpable negligence" as follows: "That the plaintiff himself did not, on the occasion complained of, omit to exercise such efforts and caution to avoid the accident and injury as a man of ordinary prudence and circumspection placed in the same circumstances would have exercised." (Rec., p. 39, fol. 71.)

We complained that the court erred in refusing the instruction asked for by the defendant in its *fourth* prayer, and in charging the jury in the terms of the second instruction given by the court, which it apparently substituted for the instruction asked by defendant.

The defendant, we submit, was entitled to have the instruction asked for, given in the words of the prayer, without qualification, for, as framed, it presented, in precise words, the true legal rule applicable to the case, to wit, that the jury must be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury.

The Court of Appeals of New York, in *Wilds* v. *Hudson River R. R. Co.*, (24 N. Y., 442,) expressly held, that an instruction, almost in the very words of defendant's *fourth* prayer, was the precise instruction called for by the case, and that it was error to refuse it, and to give a qualified instruction similar to that given by the court in the present case, though less objectionable and obscure in its terms than it.

In that case the Court of Appeals said:

"Defendant requested the court to charge, '*that if the negligence of the deceased in any manner contributed to cause the collision which resulted in his death, the plaintiff cannot recover.*' The request was so far complied with as to give the charge in the terms asked, qualifying it with the words, '*it being*

understood that this negligence is the want of such care as persons of ordinary prudence would exercise in like circumstances.' The defendant asked for a single, definite legal proposition, and excepted to having it accompanied by any addition to give it uncertainty, or tending to confuse the minds of the jury. . . . *The defendant's request certainly gave in precise words the true legal rule of the case*, and he was entitled to have it given to the jury substantially as he asked it, without qualification, or to have it plainly refused."

II. The use of the expression "*culpable* negligence," in the 2d instruction given by the court, and the other instructions referred to in the 7th and 8th assignments of error, moreover could not have failed we think to mislead the jury, especially when, by the language of the charge, they were apparently referred exclusively to the conduct of the plaintiff at the *crisis of danger*, instead of being required to consider the question of negligence on his part in the light of all he did, and omitted to do, during the time preceding the accident, that might be fairly deemed to have contributed in any manner to its occurrence.

If the second instruction means anything, it means that the plaintiff was not debarred from a recovery, unless his negligence not only contributed to the injury, but was also "*culpable*," and that it was not culpable, unless he omitted "to exercise such efforts and caution to *avoid* the accident, as a man of ordinary prudence and circumspection *placed in the same circumstances* would have exercised."

Now, the plaintiff might have done all he could to *avoid* the accident after he received the warning that was given, and "all a man of ordinary prudence and circumspection placed in the same circumstances" would have done to *avoid* it, and yet, if he was not traveling with ordinary moderation, care, and vigilance, he was, nevertheless, guilty of contributory negligence.

For it is unquestionable that if a sober man, riding with reasonable and ordinary care and vigilance, would have *seen* the obstruction, or would have become *apprised* of it in time to prevent an accident, the plaintiff was negligent

in not seeing it, or in not knowing of it, and in running against it.

The principle is stated by Denio, J., in *Johnson* v. *Hudson River R. R. Co.*, 20 New York, 69. He says: "If one make an excavation or lay an obstruction in the highway, which may or may not be the occasion of an accident to a traveler, it would be reasonable to require a party seeking damages for an injury to give general evidence that he was traveling with ordinary moderation and care."

The question of the plaintiff's own conduct and negligence, on that ride toward F street was certainly not presented to the jury in any correct way by the instruction given by the court at the trial; and the attention of the jury should have been directed to all the conduct of the plaintiff, preceding the accident, on that ride, tending to show contributory negligence on his part.

We submit the court should have instructed the jury, plainly and clearly, that the plaintiff could not recover if by *any* negligence he contributed to the injury.

This was the tenor and effect of the 4th instruction prayed for by the defendant, which the court refused to give; and instead of which it gave the instruction which is the ground of the Sixth Assignment of Error.

III. That plaintiff's own conduct and carelessness largely contributed to his mishap can scarcely be doubted under the evidence. We strongly suspect that his head was muddled and his vision obscured by the four or five glasses of lager beer he had drunk that morning since breakfast. He admits he saw the people gathered at the corner of F and Blake streets, when he left his house, and, when he rode towards them, that he saw the man up on the pole on F street, and that he heard the witness, Kerr, call to him when he was 15 feet, perhaps further, from the wire. The proof also is that at least one other person hallooed to him.

He certainly could not have been on the lookout for any obstruction that might happen, accidentally or otherwise,

to be in his path; and this of itself was negligence. We have a strong belief that if he had not drunk so much beer that morning, his head would have been clear enough, and his nerves strong enough, to apprehend the indications that something unusual at least was going on at that corner, before the crisis of danger arrived, and to check his horse before he struck the wire, unless the pace at which he was traveling was too fast, and the horse was too unmanageable, to enable him to do so, of which, indeed, there is a good deal of evidence.

The witness, Bates, saw him when he was 80 feet from the wire, and thought from the way the horse acted, that he was beyond the control of the rider, and was apprehensive of an accident.

If the man had been sober, and had his wits about him, he could not have failed to see the wire in time, and to perceive, before he got near it, that the men were engaged there in some work that rendered it necessary for him to exercise care and caution in approaching the corner on horseback.

IV. The *Fifth* Assignment of Error is to the refusal of the oourt to charge the jury, that if the injury was the result of plaintiff's own fault, or the fault or negligence of *both* parties, without any intention on the part of the defendant, the plaintiff could not recover. This instruction, asked for by the defendant, should certainly have been given. It stated the well-settled principle of the law of negligence in very accurate terms, and was applicable to the case upon the evidence before the jury; and it was, therefore, error to refuse to give it.

Seventh and Eighth Assignments of Error.

I. It is unnecessary to do more in regard to these assignments of error than to refer to what is said above in respect to the Sixth Assignment of Error. If the Sixth Assignment of Error is sustained, the Seventh must also be sustained, for the instructions upon which it is predicated are

vitiated by the reference in them to the court's definition of "*culpable negligence*," as contained in the 2d instruction given to the jury, which has been the subject of our preceding observations.

The charge of the court to the jury should have been *throughout* that plaintiff could not recover, if the jury believed from the evidence that he was guilty of *any* NEGLIGENCE which contributed to bring about the accident.

When the court spoke of the *defendant's* conduct it always spoke of its "negligence," but when it characterized the conduct of the *plaintiff* which would prevent a recovery it always characterized it as "*culpable* negligence, *as above defined.*"

The jury could not have failed to be misled by such a discrimination, unfavorable to the defendant. The court should have spoken of the "negligence" of the plaintiff, and not the "culpable negligence" of the plaintiff and the "negligence" of the defendant.

Any jury would have supposed that while the *defendant* was liable for simple negligence, the *plaintiff* was only responsible for "*culpable* negligence;" that is to say, for a greater degree of negligence than the defendant.

What else could the jury have supposed when the court told them, as it did in the instructions referred to in the seventh assignment of error, that if the defendant was *negligent* it was liable, unless the plaintiff contributed to the injury by his *culpable* negligence?

II. In the instruction embodied in the eighth assignment of error, the court also employs the expression "culpable negligence" to describe the sort of negligence that would alone affect the plaintiff's right of recovery. But this is not the only error in that instruction; for the jury were there told (if we understand it) that the omission of plaintiff to heed the warning that was given was not "culpable negligence," if he could not have checked his horse by the exercise of reasonable exertion, although he might have made no *effort* or *attempt* to check him. Clearly, it was the

duty of the plaintiff to attempt to check his speed, and whether or not he made that attempt was an element proper for the consideration of the jury in determining the question of his "culpable negligence."

Ninth Assignment of Error.

This assignment of error is founded upon the 10th instruction of the judge who tried this cause. That instruction is replete with error.

I. We begin with that part of it (the second proposition in the charge) which relates to the allowance of *exemplary* damages. No doubt the capital error of the *nisi prius* judge, and of the Supreme Court of the Territory who approved his ruling, was in charging the jury that "in fixing the plaintiff's damages they should compensate the plaintiff not alone for his actual loss in the loss of time during his confinement or disability, if any, resulting from the alleged accident, but may award *exemplary damages*," &c. (See the Instruction, Rec., p. 40, fol. 73.)

There is no doubt that the jury availed themselves freely of the large and liberal discretion with which they were thus invested by the judge, and very naturally, as juries are, undertook to *punish* the Telegraph Company for its supposed transgressions in that community.

There is nothing whatever in the evidence in regard to the extent of the injury sustained by the plaintiff, which can account for this large verdict of $5,000. When the doctor's bill is throwh out, the only actual damage assessed in the declaration was the loss of time, which the plaintiff estimated at $500.

It is quite plain that the jury gave him $5,000 not merely as compensation for his injury, but as a fine or penalty which the sworn twelve thought proper to impose upon the soulless corporation who was at their mercy by the gracious permission of the court.

The Supreme Court of the Territory, in reviewing this instruction, defends, as will be seen, with great boldness, the right of a court and jury, in a civil action for tort, "*to*

punish the offender," especially where a corporation is the "offender."

Says Belford, J.: "When the wrong done to the party partakes of a criminal character, though not punishable as an offense against the State, the *public* may be said to have an interest that the wrong-doer should be prosecuted and brought to justice in a civil suit." (Rec., p. 56, fol. 103.)

This manifestly was the spirit and doctrine of the charge at the trial, and the jury so understood it.

We shall not discuss here at length the question whether, in any case, a jury may legally inflict what are called exemplary, punitive, or vindictive damages on a defendant, having in view not the compensation of the plaintiff, but the punishment of the wrong. But it is well to note that there is high authority for saying that no such power can legally be exercised in any case. Thus Mr. Greenleaf denies that damages can be given otherwise than as compensation, or satisfaction for the injury actually received by the plaintiff; and he declares that, in every case, the damages "should be *precisely commensurate with the injury*, neither more nor less, and this, whether it be to his person or estate." (2 Greenleaf on Ev., § 253.)

And, after an exhaustive review of all the decisions supposed to sanction the right to give punitive damages, the author says, in his note on this subject, "however this view may appear to be justified by the general language of some judges, and by remarks gratuitiously made in delivering judgment on other questions, it does not seem supported to that extent by any *express decision on the point*, and is deemed at variance not only with adjudged cases, but with settled principles of law." (See also 3 Am. Jurist, 305–6; 9 L. R., 529.)

The article in 3 Am. Jurist, 305, entitled "*Damages in Actions ex Delicto*," affirms Mr. Greenleaf's view, and, as the work of Judge Metcalf, is entitled to high consideration. Its theory is, that the Anglo-American law does not admit of any other than compensatory damages. Judge Metcalf submits that if the phrases exemplary damages,

vindicative damages, mean that it is allowable for a jury to give damages beyond the amount of what the law regards as *actionable injury to the plaintiff*, by way of *punishing* the defendant for the purpose of public example, they are not true. And Mr. Sedgwick, in the 4th edition of his work on *Damages*, (p. 465,) is compelled to admit that it is true that the allowance of punitive damages in a civil suit is a wide departure from the principle on which, both in England and the United States, damages in such suits are awarded, which is *compensation*.

II. Even where the dogma of exemplary damages is conceded, it is subject to the qualification that a principal cannot be compelled to pay such damages for the fault of his agent.

In *M. & M. R. R. Co.* v. *Finney*, (10 Wis., 392,) Dixon, C. J., said:

"Such damages are given by way of punishing the malice or oppression, and are graduated by the *intent*, of the party committing the wrong. But, in an action against a principal for the act of an agent, how can the question of their assessment be properly submitted to the jury when there is no evidence connecting the principal with such intent on the part of the agent. Clearly, it cannot."

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The Supreme Court of Louisiana also say: "The company, in such a case, is not to be punished for the negligence of its agents as a crime." (Hill *v.* Opelousa R. R., 11 La. Ann., 294.)

The Supreme Court of California likewise holds that the principal is liable as for simple negligence, and exemplary damages cannot be imposed upon him. (Wardrobe *v.* Stage Co., 7 Cal., 120.)

III. But, if exemplary damages are ever recoverable, and are allowable against a principal for the act of his agents, we maintain that they are never allowable in any case where the injury was inflicted without design or intention. To justify them, in any case, the act must be wilful, and the purpose must be malicious or malignant, and legally

entitled to be so considered by the jury. The Supreme Court of Missouri say: "The act complained of must partake of a *criminal* act." (Kennedy *v.* North Miss. R. R. Co., 36 Miss., 351.) The Supreme Court of Wisconsin, (Dixon, C. J.,) say: "Such damages are given by way of punishing the malice or oppression, and are graduated by the *intent*, of the party committing the wrong." (20 Wisconsin, 372.) The same doctrine is declared by other authorities. (Pickett *v.* Crook, 20 Wis., 358; L. P. R. R. Co., 2 Duv. (Ky.,) 556; Wallace *v.* The Mayor, 2 Hilt, 440.)

We deny that exemplary damages can be allowed for gross negligence merely.

IV. This was, therefore, in no view of it, a case in which the court was justified in instructing the jury that exemplary damages could be recovered. No clearer case for compensatory damages merely, if any, could be presented. It would be preposterous to say that the court or jury had any right to consider the acts or omissions of the men engaged in putting up this wire as wanton and malicious, or gross and outrageous in their character. If they were negligent at all, it was simple negligence. Certainly there was no malice or evil intent in their conduct. The testimony of Mr. Washburne was that he stationed three men at the corner, and instructed them to keep people off the wire, and that he used the same care and diligence as he always used. (Rec., p. 34, fol. 61.)

The judge, nevertheless, told the jury that if there was a simple omission to station flag sentinels, (no matter if the street was known to be *barricaded* above, so that people were warned against traveling in it,) or if such sentinels were stationed, and there was an omission on their part to give warning to plaintiff, (no matter what the cause of such failure might have been, even if they had been struck *dumb*,) the company was, by conclusive judgment of law, guilty of negligence, and of gross and outrageous negligence, and that the jury had the absolute right (indeed it

would seem to have been impressed as a duty on the jury) to give exemplary damages proportioned to the circumstances of aggravation or mitigation attending this negligence, and that the extent of such damage, within the amount claimed in the declaration, was to be measured only by their discretion. The real effect of this charge plainly is, that in every case of negligence resulting in an injury to an individual, the jury has full discretionary power to award exemplary damages. This is a monstrous doctrine, which this court, we apprehend, will hasten to correct.

The judgment should be reversed on account of the charge on this subject of exemplary damages, if on no other ground.

V. But this was not the only error committed by the court in giving the 10th Instruction under consideration.

We ask attention now to the *first* proposition in that instruction. (Rec., p. 40, fol. 73.)

The court, it will be perceived, absolutely took from the jury substantially every question in regard to the alleged negligence of the defendants' servants, and peremptorily instructed them, as matter of law, that the supposed omissions constituted not only negligence, but such negligence —negligence of such a grade and character—as authorized them to award exemplary damages for the injury sustained. The court determined for the jury not only that the supposed omissions were negligence, but that they were negligence of the grossest character. The jury were left nothing to decide. They might as well have been dispensed with entirely. The court tried the case. The jury were in substance told that, in no contingency, and in no possible or conceivable state of facts, would the law deem the omissions supposed, on the part of the servants of the corporation, anything but actionable negligence, and negligence of a gross sort, and no duty was left them except to fix the *quantum* of exemplary damages. This, we submit, is not jury trial, in any just sense of the term.

The question of negligence involved the inquiry, what care and caution prudence required of the agents of the corporation under the circumstances — what reasonable men would ordinarily have done under the circumstances.

It was not for the court to decide this question. There was no law that made it a duty to send out flag-sentinels. The defendant was only required to take ordinary and reasonable care. What measures of care the danger required, or prudent persons would have taken, under the circumstances, in order to prevent an accident, was a question peculiarly for the jury to decide. The law has not undertaken, except in certain instances, to define what a person ought or ought not to do under particular circumstances; and where it has not defined this duty, it commits the question of what is negligence, and whether it has been proved, to the decision of the jury.

In *Patterson* v. *Wallace*, (1 McQueen, House of Lords, 748,) the facts were not in controversy, and the only question was, whether they established negligence on the one side or rashness on the other. The House of Lords held that it was a pure question of fact for the jury, and should have been submitted to them.

The observation of Lord Cranworth, in that case, is applicable to this: "With all deference to the learned judges, it appears to me that they have misunderstood the province of a judge at a trial of this sort."

But it is unnecessary to discuss the question upon principle, or the authorities of other courts, for we understand that it has been decided by this court.

In the late case of RAILROAD CO. *v.* STOUT, (17 Wall., 664,) this court considered the question of the proper domain of the jury in actions for negligence.

Mr. Justice Hunt, in that case, said:

"Twelve men of the average of the community, comprising men of education and men of little education, men of learning, and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer—these sit together, con-

sult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

"In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that, although the facts are undisputed, it is for the jury, and not for the judge, to determine whether proper care was given, or whether they established negligence."

As the other authorities upon this subject are referred to by Mr. Justice Hunt, in delivering the opinion of the court in that case, it is unnecessary to cite them here, especially as the judgment of the court in that case is itself a decision of the present question.

We respectfully submit, under the authority of *Railroad Co.* v. *Stout*, that the judge who tried this cause had no right to determine the question of negligence on the part of the defendants' servants as matter of law, and it was his duty to submit to the jury the question whether proper care was exercised under the circumstances of the case.

The court decided, as matter of law, not only that the defendant was guilty of negligence, but also that the supposed omissions constituted such gross negligence as authorized the imposition of exemplary damages. There was here a double usurpation of power on the part of the court. The question of negligence and the question of the degree or character of the negligence, if the jury should think it proper to impute any to the defendant, were both questions for the jury, and should have been submitted to them by the court.

It is respectfully submitted that the judgment should be reversed and a *venire facias de novo* awarded.

J. Hubley Ashton,
Grosvenor Porter Lowrey,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

No. 118.

THE WESTERN UNION TELEGRAPH COMPANY,
PLAINTIFF IN ERROR,

vs.

CHARLES EYSER.

In Error to the Supreme Court of the Territory of Colorado.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

This is an action brought by Charles Eyser against the Western Union Telegraph Company, trespass on the case, in the district court of the first judicial district of Colorado Territory, in and for Arapahoe county, for injuries he received through the culpable carelessness and neglect of the agents and employees of the plaintiff in error while putting up a telegraph wire across Blake and "F" streets, in the city of Denver, in said county and Territory, on the 18th day of April, 1870.

It appears from the testimony that on that day Eyser, being on horseback, was riding along Blake street, in the direction of the bridge across Cherry creek, when his horse became entangled in a wire, which the agents of the Western Union Telegraph Company were putting up at the intersection of Blake and "F" streets, in consequence of

which the animal was frightened, and in its efforts to free itself was thrown to the ground, falling on the rider, stunning and very severely injuring him, so that for months he was confined to his house, compelled to go on crutches, and was rendered incapable of following his occupation of carpentering for a long time.

Testimony of—

Charles Eyser, pp. 15, 16, and 17.
Wm. Burt, pp. 17 and 18.
Major Peabody, pp. 18, 19, and 20.
Joseph Kock, pp. 20 and 21.
John Kauffman, pp. 21 and 22.
L. McCarty, pp. 22 and 23.
Dr. McClellan, pp. 23 and 24.
Hannah Eyser, pp. 24 and 25.
H. Z. Salomon, pp. 25 and 26.

The character and extent of the injuries received by Eyser are fully shown by these witnesses, and also the utter carelessness and recklessness of the plaintiff in error in stretching wires across a crowded thoroughfare in a city, without taking any precautions to warn passersby of danger.

William Burt, (p. 18,) says, "there were no precautions there to prevent accidents that I saw." So says Major Peabody, p. 19. Eyser says he did not see the wire, but some one called him by name about the time his horse struck it, (p. 16) All the witnesses who saw the accident say the wire was frequently elevated and lowered.

Some effort was made on the part of the defendant below to show that the accident resulted from Eyser's own carelessness, and also to avoid the responsibility of the defendant below, but the case having been submitted to a jury, a verdict of "guilty" was rendered, and the damages assessed at five thousand five hundred dollars in favor of Eyser, (p. 41, for which judgment was entered, after a motion had been made for a new trial and denied.

From this an appeal was taken by the defendant to the Supreme Court of the Territory, where the judgment of the court below was affirmed.

The case is brought here on error.

We deny that there was any error in the rulings of the court below, or in the charges given to the jury.

For the reversal of the judgment of the court below the appellant seems to rely chiefly on the first cause of error assigned, viz., that the court sustained the demurrer of the second, third, and fourth pleas of the defendant, and Belford, J., seemed to think there might be error in this ruling as to the second plea, that of *nul tiel corporation*, but the majority of the court held differently, and said (pp. 58 & 59:)

"No opinion is expressed upon the question, whether the plea of *nul tiel* corporation may be pleaded in bar or not, but the majority of the court are of the opinion that the defendant cannot deny its own capacity by a plea, pleaded either alone or with other pleas, in abatement or in bar. If the defendant be not a corporation, then it is nothing; it cannot appoint an attorney; it cannot, by attorney or otherwise, be present in court; it cannot plead, for it is not. The plea is therefore *felo de se*. (The President and Trustees, &c., *vs.* Wadleigh, 6 Blf., 297.) The demurrer to this plea was therefore properly sustained. Upon the other questions, the opinion of Mr. Justice Belford is the opinion of the whole court.

"Let the judgment of the district court be affirmed."

It would seem to be an absurdity to allow a defendant to come into court in response to the writ, plead the general issue, and then deny his own existence.

In the case of a corporation suing, the defendant might set up the plea of *nul tiel corporation*, and thus put the corporation to the proof of establishing its legal existence; but to allow a defendant corporation to come into court and deny its own existence is hardly permissible.

But had that plea been allowed to stand, the record shows that it would not have availed the defence anything, for it

is clearly and distinctly shown by the record, and it is a well-known fact, that the Western Union Telegraph Company is, and was at that time, a corporation. This ruling of the court in no wise prejudiced the case.

If, therefore, there was nothing in the charge of the court below calculated to mislead, will this court set aside the verdict of the jury? It cannot be denied that Eyser received serious injury; neither can it be denied that the jury and the court below acted on the merits of the case. Then on what grounds can the judgment be reversed?

"Where some errors are committed by the court below, which do not materially affect the merits of the case, if, on looking at the whole case, justice appears to have been duly administered, the appellate court will not disturb the judgment."

Clayton *vs.* West, 2 Cal., 381.
Johnson *vs.* McLane, Hempst., (Tenn.,) 59.
Fisher *vs.* Reider, id., 82.
Horr *vs.* Reed, 20 Iowa, 591.
Goben *vs.* Hudgens, 15 Mo., 400.

"Where the same facts could have been proved (and made available) under two paragraphs of a pleading, the striking out of one is not a fatal error."

Daily *vs.* Nutman, 14 Ind., 339.

"Where a proper result has been reached, the appellate court will not reverse a judgment because of an error in the mode in which the result was reached."

Freeman *vs.* Bowman, 25 Ind., 236.
Dunning *vs.* Driver, id., 269.
Holcraft *vs.* King, id., 352.

The opinion of the Supreme Court of the Territory of

Colorado, as delivered by Judge Belford, is very full and very clear on all the points involved in this case, except as to the single point of the plea of *nut tiel* corporation, in which he seems to have fallen into the error of supposing that the party adverse to the corporation had filed the plea, for all the authorities he cited have that bearing. This, however, is fully met by the opinion of the majority of the court above quoted.

We ask that the judgment of the court below be affirmed.

J. W. DENVER,
Attorney for Appellee.

20 Howard 34 —
6. Black 258 —